Petition

8 No. 1873

Supreme Court, U.S.
FILED
APR 8 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

BUNYAN W. ANDERSON, PETITIONER,

versus

JOANNE E. ANDERSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

JAN L. WARNER,
Post Office Box 2347,
Sumter, South Carolina
29150,
(803) 773-1596,
Attorney of Record,

C. DIXON LEE, III,
Post Office Box 2347,
Sumter, South Carolina
29150,
(803) 773-1596.

QUESTIONS PRESENTED FOR REVIEW:

1. Whether an *ex parte* off-the-record meeting between the Respondent's attorney and the trial judge, who sat as a Court of equity without a jury, which was conducted without notice to the Petitioner or his attorney; which occurred subsequent to the presentation of evidence, but before a decision on the merits of the action was issued; and which was conducted for the express purpose of providing the trial judge information about the case, discussing the case, and answering the trial judge's questions about the case, denied the Petitioner his right to due process of law under the Fourteenth Amendment of the United States Constitution so as to constitute a substantial and grave miscarriage of justice and thus warrant the May 18, 1981 Order of the trial court being vacated or reversed, and the action being remanded for a new trial.

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Authorities iv

Opinions Below 1

Grounds on Which Jurisdiction is Invoked 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition 6

Conclusion 9

Appendix ..... A-i

TABLE OF AUTHORITIES

PAGE

Cases Cited:

Armstrong v. Manzo, 380 U.S. 545 (1965) 7

Bailey v. Bailey, 235 S.E. 2d 801 (S.C. 1977) 8

Bodie v. Connecticut, 401 U.S. 371 (1971) 7

Carter v. Morehouse Parish School Board, 441 F. 2d 380 (5th Cir. 1971), cert den. 404 U.S. 880 7

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 8

Fuentes v. Shevin, 407 U.S. 67 (1972) 7

Ingraham v. Wright, 430 U.S. 651 (1977) 7

Joint Anti-fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 7

Little v. Streater, _____U.S._____, 101 S.Ct. 2202 (1980) 7

Mattox v. United States, 146 U.S. 140 (1892) 7

Offutt v. United States, 348 U.S. 11 (1954) 8

Simmons v. Simmons, 267 S.E. 2d 427 (S.C. 1980) . 8

Miscellaneous:

U.S. Const. Amend XIV 2, 6

U.S. Const. Art XI, Section 2 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. -

BUNYAN W. ANDERSON, PETITIONER,

versus

JOANNE E. ANDERSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

The Petitioner Bunyan W. Anderson, respectfully requests that a Writ of Certiorari issue to review the January 7, 1982 decision of the Supreme Court of South Carolina.

OPINIONS BELOW

An unreported decision of the Supreme Court of South Carolina was handed down on January 7, 1982 and is reproduced herein as Appendix A. An unreported decision of the

Supreme Court of South Carolina on Petitioner's Motion for Clarification was handed down on February 2, 1982 and is reproduced herein as Appendix B.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision of the Supreme Court of South Carolina was handed down on January 7, 1982. This Petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

2. Article XI, Section 2 of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Joanne E. Anderson, Respondent herein, commenced a civil action against Bunyan W. Anderson, Petitioner herein, by Petition dated May 16, 1979. She sought divorce, alimony, custody of the parties' minor children, child support, equitable division of marital property, attorney's fees, and certain other relief generally associated with domestic litigation. After an exchange of responsive pleadings and discovery, hearings on the merits of the case were commenced before the Honorable S. Norwood Gasque, Chief Judge of the Family

Court of the Fourth Judicial Circuit for the State of South Carolina, sitting as a Court of equity without a jury, on October 28, 1980. The trial lasted a total of eleven (11) days, spread over four (4) months, with the final hearing date being February 20, 1981. Thereafter, the parties exchanged Briefs on the factual and legal issues, and submitted the same to the trial judge. Respondent's Brief was filed with the Court and served on or about March 5, 1981; Petitioner's Brief on or about March 20, 1981; and Respondent's Reply Brief on or about March 27, 1981.

Oral arguments before the trial judge were scheduled for Friday, March 27, 1981; however, such were cancelled during the week preceding that date. A copy of the March 24, 1981 letter from Respondent's attorney to the trial judge confirming cancellation of oral argument is reproduced herein at Appendix C. On May 18, 1981, the trial judge issued an Order deciding all issues except the amount of attorney's fees to be awarded Respondent's attorneys. Jurisdiction over that issue was expressly reserved. The May 18, 1981 Order, among other things, awarded Respondent a substantial ownership interest, which the trial judge valued at Two Hundred Ten Thousand and no/100 ($210,000.00) Dollars, in certain real and personal property, the majority of which was acquired by Petitioner from his parents through gift and/or inheritance. That Order also required Petitioner to pay Respondent Sixty Five Thousand and no/100 ($65,000.00) Dollars in lump sum alimony, thus increasing the total amount awarded to Respondent, exclusive of attorney's fees, to Two Hundred Seventy Five Thousand and no/100 ($275,000.00) Dollars. The May 18, 1981 Order of the Family Court of the Fourth Judicial Circuit of the State of South Carolina is reproduced herein at Appendix D.

Petitioner and Respondent each appealed the May 18, 1981 Order to the Supreme Court of South Carolina. The appeals vested exclusive jurisdiction in the Supreme Court of

South Carolina over all issues except the issue of attorney's fees over which the trial judge had expressly retained jurisdiction. A hearing on the issue of attorney's fees was held by the trial court on November 12, 1981.

During the course of the attorney's fees proceedings and the exchange of documentation relevant thereto, Petitioner discovered that on March 27, 1981, more than one (1) month after the last date of the hearing on the merits, after Briefs had been submitted, but before a decision had been issued by the trial judge, and on the very day oral arguments were scheduled but cancelled, Eugene F. Rogers, one of the attorneys who represented Respondent, met with the trial judge for the express purpose of providing the judge information concerning the case, discussing the case, and answering the judge's questions about the case. No record was made of this meeting. Neither Petitioner nor his attorney were given any notice of the meeting.

Petitioner's first indication that the March 27, 1981 meeting between Respondent's attorney and the trial judge had occurred came in mid-June 1981 when Petitioner's counsel received a time itemization from R. Harry Easterling, one of the attorneys representing Respondent, indicating that on March 27, 1981, Mr. Easterling had a conference with Judge Gasque and Eugene F. Rogers. According to Mr. Easterling's records, five and one-half (5½) hours were devoted to the foregoing conference and travel. The relevant portion of Mr. Easterling's original time itemization is reproduced herein at Appendix F. On November 11, 1981, one (1) day before the attorney's fees' hearing, Mr. Easterling provided the Petitioner's attorneys with a revised time itemization wherein he deleted the reference of having a conference with Judge Gasque on March 27, 1981, and amended the same to show only a conference with Mr. Rogers on that date lasting three (3) hours. The relevant portion of Mr. Easterling's revised time itemization is reproduced herein at Appendix G. Mr.

Easterling's testimony at the November 12, 1981 hearing was that his records were in error insofar as they showed a trip to Dillon, South Carolina or a meeting with Judge Gasque on March 27, 1981. The relevant portion of Mr. Easterling's testimony is reproduced herein at Appendix H.

Mr. Rogers' time records were first provided to the Petitioner's attorneys in October 1981. Initially, Mr. Rogers listed a nine and one-half (9½) hour conference occurring on March 27, 1981 with Mr. Easterling and Judge Gasque. The relevant portion of Mr. Rogers' original time itemization is reproduced herein at Appendix I. This was subsequently revised to show an eight (8) hour conference occurring on March 27, 1981 with Mr. Easterling and Judge Gasque. The relevant portion of Mr. Rogers' revised time itemization is reproduced hereinafter at Appendix J. At the November 12, 1981 hearing, Mr. Rogers admitted, under oath, that the March 27, 1981 meeting was for the express purpose of providing the Judge information concerning the case, discussing the case, and answering the Judge's questions about the case. The relevant portion of Mr. Rogers' testimony at the November 12, 1981 hearing is reproduced herein at Appendix E.

By Motion before the Supreme Court of South Carolina dated November 13, 1981, reproduced hereinafter at Appendix K, one (1) day after Respondent's attorney admitted the *ex parte* meeting and its purpose, Petitioner sought relief from the Supreme Court of South Carolina on the grounds that his right to due process of law had been denied by reason of the aforesaid *ex parte* off-the-record meeting. This motion was originally made before the Supreme Court of South Carolina as that Court had exclusive jurisdiction over the action by virtue of the pending appeals. The Motion was denied, without opinion, by the Supreme Court of South Carolina by unpublished Order dated January 7, 1982 which is reproduced herein at Appendix A. Petitioner thereafter made a Motion for Clarification of that Order. By Order

dated February 2, 1982, the Supreme Court of South Carolina clarified its prior Order stating: "Previous Motion denied without merit; likewise the present Motion is without merit." That Order is reproduced herein at Appendix B. While the direct appeal from the May 18, 1981 Order will continue in the state courts, Petitioner's claim that he was denied due process of law has been finally decided by the highest state court in which review may be had and, irrespective of the outcome of the pending state court appeal, no further review of this federal issue in the state courts is possible. Thus a final judgment or decree exists.

The questions presented for review herein have been timely raised as well as explicitly presented to and passed upon by the Supreme Court of South Carolina. That Court has issued a final decision regarding the federal question of whether Petitioner was denied due process of law by reason of the *ex parte* off-the-record meeting between the trial judge and the Respondent's attorneys, having found that Petitioner's argument is without merit.

REASONS FOR GRANTING PETITION

The *ex parte* off-the-record meeting between Respondent's attorney and the trial judge, who sat as a Court of equity without a jury, which was conducted without notice to the Petitioner or his attorney; which occurred subsequent to the presentation of evidence, but before a decision on the merits of the action was rendered; and which was conducted for the express purpose of providing the trial judge information about the case, discussing the case, and answering the trial judge's questions about the case, denied the Petitioner his right to due process of law under the Fourteenth Amendment of the United States Constitution so as to constitute a substantial and grave miscarriage of justice and thus warrant the May 18, 1981 Order of the trial court being vacated and reversed and the action being remanded for a new trial.

Due process must be afforded when a state seeks to deprive an individual of a protected liberty or property interest. *Ingraham v. Wright*, 430 U.S. 651 (1977). Substantively, unfair or mistaken deprivations of property are a danger that is especially great when the state seizes goods upon the application and for the benefit of a private party. *Fuentes v. Shevin*, 407 U.S. 67 (1972), rehearing den. 409 U.S. 902. Once a fundamental interest is placed in jeopardy by state action, a Court of review must focus its inquiry on the sufficiency of the procedures involved to insure fairness to the potentially aggrieved individual. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). At a minimum, then, due process requires that every individual forced by the state to resolve claims of right, duty, and liability through the judicial process be afforded a meaningful opportunity to be heard. *Little v. Streater*, ____ U.S. ____, 101 S.Ct. 2202 (1981); *Bodie v. Connecticut*, 401 U.S. 371 (1971). A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin, supra; Armstrong v. Manzo*, 380, U.S. 545 (1965).

It has long been recognized that "fairness can rarely be obtained by a secret, one-sided determination of the facts decisive of rights . . . [and n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath, supra*, at 170-172 (Frankfurter, J., concurring).

"A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process" *Carter v. Morehouse Parish School Board*, 441 F. 2d 380 at 382 (5th Cir. 1971), cert den. 404 U.S. 880.

As recognized in *Mattox v. United States*, 146 U.S. 140 (1892):

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in

> charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear. 146 U.S. at 150.

Here, after eleven (11) days of adversary proceedings, the attorney representing the Respondent surreptitiously and covertly met with the trial judge, who sat both as Judge and jury, while the matter was under advisement, for the express purpose of providing the trial judge information about the case, discussing the case, and answering the Judge's questions about the case. No record of this meeting was made. Neither Petitioner nor his attorney were given any notice whatsoever of the meeting. What information or evidence was provided to the trial judge by Respondent's attorneys at this *ex parte* off-the-record meeting remains unknown. Petitioner was not given notice of the meeting, opportunity to appear and defend, or opportunity to confront or cross-examine the evidence and witnesses presented against him at that private meeting.

The law of the State of South Carolina vests the trial judge with broad discretion in deciding questions of alimony and equitable division. *Bailey v. Bailey*, 235 S.E. 2d 801 (S.C. 1977); *Simmons v. Simmons*, 267 S.E. 2d 427 (S.C. 1980). The likelihood that the *ex parte* off-the-record meeting on March 27, 1981 influenced this broad discretion is substantial. While there are further proceedings pending on the merits of Petitioner's appeal in the state courts, Petitioner's federal claim has finally been decided and is not subject to further review by the state courts, thus a final judgment or decree, subject to review by this Court, exists. *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975).

As recognized by Justice Frankfurter in *Offutt v. United States*, 348 U.S. 11 (1954), "Justice must satisfy the appearance of justice."

Here, the record conclusively reflects that Respondent's attorney and the trial judge, who sat as both Judge of the law

and of the facts, met *ex parte* and off-the-record prior to the decision being rendered, without notice to the Petitioner or his attorney, for the express purpose of providing the trial judge information about the case, discussing the case, and answering the trial judge's questions about the case. Petitioner was not given an opportunity to confront or rebut whatever information or evidence was provided to the trial judge at this hearing. Petitioner has suffered a grave and substantial denial of his right, under the Fourteenth Amendment of the United States Constitution, to due process.

CONCLUSION

For the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue to review the January 7, 1982 decision of the South Carolina Supreme Court.

Respectfully submitted,

JAN L. WARNER,
Attorney of Record,
Post Office Box 2347,
Sumter, South Carolina
29150,

C. DIXON LEE, III,
Post Office Box 2347,
Sumter, South Carolina
29150.

Appendix

APPENDIX CONTENTS

PAGE

Appendix A: Unreported decision of the South Carolina Supreme Court handed down on January 7, 1982. ..... A-1

Appendix B: Unreported decision of the South Carolina Supreme Court denying Petitioner's Motion for Clarification handed down on February 2, 1982. ..... A-2

Appendix C: Copy of March 24, 1981 letter from Respondent's attorney to the Trial Judge confirming cancellation of oral argument. A-3

Appendix D: May 18, 1981 Order of the Family Court of the Fourth Judicial Circuit of the State of South Carolina. A-4

Appendix E: Pertinent part of Mr. Rogers' testimony at the November 12, 1981 hearing. A-42

Appendix F: Copy of pertinent portion of Mr. Easterling's time records. A-43

Appendix G: Copy of Mr. Easterling's revised time itemization. A-43

Appendix H: Pertinent part of Mr. Easterling's testimony at the November 12, 1981 hearing. ... A-43

Appendix I: Pertinent portion of Mr. Rogers' original time and expense itemization. A-46

Appendix J: Mr. Rogers' revised time and expense itemization. A-46

Appendix K: November 13, 1981 Motion. A-47

APPENDIX A

THE SUPREME COURT OF SOUTH CAROLINA

January 8, 1982

Jan L. Warner, Esquire
P. O. Box 2347
Sumter, South Carolina 29150

Re: Anderson v. Anderson

Dear Mr. Warner:

The following Order has been endorsed on your Motions in the above matter:

"Motions denied.

s/J. Woodrow Lewis C.J.

January 7, 1982."

Very truly yours,

s/Reba D. Mims
Deputy Clerk

/BS

cc: Eugene F. Rogers, Esquire
P. O. Box 58
Columbia, South Carolina 29202

R. Harry Easterling, Esquire
P. O. Box 655
Bennettsville, South Carolina 29512

APPENDIX B

THE SUPREME COURT OF SOUTH CAROLINA

Feburary 2, 1982

Jan L. Warner, Esquire
P. O. Box 2347
Sumter, South Carolina 29150

Re: Joanne E. Anderson v. Bunyan W. Anderson

Dear Mr. Warner:

Your Motion for Clarification has been considered by the Court and the following Order endorsed thereon:

"Previous Motion denied without merit; likewise the present Motion is without merit.

s/J. Woodrow Lewis, Chief Justice

February 2, 1982."

Very truly yours,

s/Frances H. Smith
Clerk

FHS/chh

cc: Eugene F. Rogers, Esquire

APPENDIX C

ROGERS, McDONALD, McKENZIE,
FULLER AND RUBIN

March 24, 1981

The Honorable S. Norwood Gasque
Judge, Family Court
Fourth Judicial Circuit
Post Office Box 1022
Dillon, South Carolina 29436

Re: Anderson vs. Anderson
Our File No. 300-799

Dear Judge Gasque:

Upon receipt of Jan's letter enclosing his Brief, I called to discuss oral argument with him and we agreed at that time to cancel the oral argument. I believe you had done so anyway upon receipt of my letter from last week.

My reply to Jan's brief will be forthcoming within the time frame which was agreed upon.

Yours very truly,

ROGERS, McDONALD, McKENZIE,
FULLER AND RUBIN

BY: s/Eugene F. Rogers

EFR:dh

cc: Mrs. Joanne E. Anderson
Mr. Harry R. Easterling
Mr. Jan L. Warner

APPENDIX D

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO
IN THE FAMILY COURT
DOCKET NO. 79-CR-34-166

Joanne E. Anderson, Petitioner,
vs.
Bunyan W. Anderson, Respondent.

ORDER

This action was instituted by the filing and service of a Summons and Petition on May 16, 1979. The Petitioner seeks a divorce, custody of children, support, alimony, attorneys' fees and an equitable division of property acquired by the parties during the marriage.

In due course the Respondent answered and after various amendments to the pleadings filed a counterclaim also seeking custody of the children, a divorce based on one year's separation, attorneys' fees and he also asked for an equitable division of properties owned by the parties.

The trial of this case has been a complex and mammoth undertaking. Both sides were represented by skillful counsel who vigorously represented the respective interests of their clients. The differences between the parties were sharply drawn. Acrimony abounded. Every significant issue throughout the proceeding was bitterly contested. Each issue was thoroughly explored. Depositions were taken in the pre-trial stages, four separate pre-trial or *pendente lite* hearings were held at various stages of the proceedings, exhibits were exchanged, motions heard, orders passed, psychiatric evaluations conducted and reports made, all prior to commencement of trial. Efforts of the court to resolve the differences between the parties were unavailing. The trial commenced on October 28, 1980, and continued intermit-

tently until February 20, 1981. The taking of testimony consumed eleven (11) days. While the testimony has only been partially transcribed, it is estimated that a transcript would take up several thousand pages. During trial numerous objections were lodged. Dozens of exhibits were introduced. Extensive briefs were submitted by the parties comprehensively covering the issues. The Reply Brief was received on March 26, 1981.

Multiple issues were presented for the court's determination. In addition, numerous issues involving pleadings and matters of evidence were presented. The trial was long, bitterly contested and difficult. The principal issues submitted to the court for determination relate to custody of children, visitation privileges, a college education for the eldest child, a divorce (to whom and on what ground), alimony, equitable distribution of marital property and attorneys' fees and costs.

Before beginning a discussion of the issues, a brief discussion relating to the background of the marriage is appropriate.

The Petitioner was born in Florence, South Carolina, on April 29, 1940. She attended the public schools in Columbia and upon graduation, attended the University of South Carolina. She met the Respondent and after a courtship was married in Columbia, South Carolina, on June 24, 1961. That union produced three children, to wit: Mary Dana Anderson, born on the 23rd day of May, 1963, Nancy Rebecca Anderson, born on the 9th day of May, 1966, and Patricia Ann Anderson, born on the 31st day of December, 1970.

At the time of the marriage Mrs. Anderson was a rising senior at the University of South Carolina. She was an honor student and on the dean's list. As a condition of the marriage it was agreed that she would continue her education, and she did so, graduating in the Spring of 1962 in the top twenty (20%) percent of her class.

At marriage Respondent was employed with his father in a farming operation in Timmonsville, South Carolina. He had attended and was graduated from Clemson University with a degree in agronomy. In the Fall of 1962 he discontinued his arrangement with his father and accepted employment with the United States Department of Agriculture.

Throughout the marriage both parties were unusually industrious and worked diligently, Mrs. Anderson as a school teacher, art teacher, homemaker and helpmate for Mr. Anderson and Mr. Anderson as a county farm agent and in various farming operations.

There is no allegation in the pleadings, no evidence in the record nor any complaint of any third party involvement by either of the parties. While there have been multiple complaints by each against the other, there have been none directed at sexual infidelity.

Tensions developed during the last few years of marriage and the parties separated on May 7, 1979. After that date they have not lived together as husband and wife. The wife has had custody of the children, subject to visitation privileges as outlined by Order of the court.

THE WIFE'S POSITION

It is the wife's position that she has at all times been a loyal, hard working, kind and dutiful wife and that she was without fault in creating the differences in the family. She contends that during the entire marriage, with the exception of about a year after the marriage and the periods when she was bearing children, she worked as a school teacher or teaching art, and that she produced substantial income resulting in direct financial benefits to the family.

She further says that she made substantial indirect contributions through performing valuable family services in the home caring for the children, preserving food through canning and freezing, sewing and making clothing for the family, assisting in keeping books and writing checks for the farming operation, assisting her husband with his civic endeavors thus promoting his career and performed various other valuable services which indirectly benefited the family and has resulted in valuable properties created by joint effort but taken in the name of the husband.

She further states that she and her husband made valuable contributions toward the husband's family as a result of which valuable properties were given to the husband or left by will of his late father, and that these properties have been improved by their work and labor, and as a result thereof she is entitled to an equitable interest in these properties.

The Petitioner contends that the Anderson family assets have a value in excess of Nine hundred fifty-five thousand and no/100 ($955,000.00) dollars and asked that the court award her a sum, which when added to the approximately Fifty-five thousand and no/100 ($55,000.00) dollars in assets held by her, will equal Four hundred seventy-five thousand and no/100 ($475,000.00) dollars, or fifty (50%) percent of the assets held by the family, representing her fair share of an equitable distribution of these assets. In addition thereto, she has sought alimony and support of Two thousand eighty-four and 24/100 ($2,084.24) dollars per month.

It is the wife's position that the immediate cause of the separation was the physical cruelty of the husband in assaulting her on three separate occasions, the last of which occurred during the night of May 7, 1979. On that occasion she states that her husband assaulted her and forcibly had sexual relations with her at a time when she was suffering from a painful vaginal infection then under treatment by her gynecologist and at a time when she had not fully recovered from knee surgery performed at Roper Hospital in Charleston. She states that during the assault she was hurt, her head was injured, she was bruised, her clothing torn, and as a result of fear and anxiety she left home and went to the home of friends where she was seen, examined and treated by her physician. It is her contention that this had occurred on two other occasions, one of which was seen by the children, who came to her aid, and that she found it impossible to resume living with her husband.

It is Mrs. Anderson's position that she was innocent in bringing on tensions within the family and that they were brought about by the husband's mistreatment of her and the children and his neglect of them in favor of his parents.

It is the wife's further position that she should have custody of the children and that the husband should be required to pay the educational costs of the older child, who will be graduating from Marlboro Academy with the 1981 high school graduating class.

It is the wife's further position that the costs and expenses of the within action, including attorneys' fees, should be borne by the husband.

THE HUSBAND'S POSITION

It is the husband's position that he has worked diligently during the course of the marriage and that he has been a good husband and father. He contends that the wife, without justification, left the family home with the children and that the wife is not entitled to alimony nor support. It is his further contention that the wife presently has in her name assets valued at more than her contribution to the marriage. He takes the position that almost all assets are the result of his work and gifts and bequests from his family. He states that he had some of the assets at marriage.

In contrast to the wife's contention that the Anderson family assets have a value of more than Nine hundred fifty-five thousand and no/100 ($955,000.00) dollars, the husband takes the position that these assets are valued at approximately Five hundred forty thousand and no/100 ($540,00.00) dollars. It is his view that of the Five hundred forty thousand and no/100 ($540,000.00) dollars in assets, Three hundred fifteen thousand and no/100 ($315,000.00) dollars represent the value of gifts and bequests from his parents. It is his view that the value of assets subject to equitable division total Two hundred twenty-five thousand and no/100 ($225,000.00) dollars and of that amount eighty-one (81%) percent is the result of the efforts of Respondent and nineteen (19%) percent the result of the efforts of Petitioner.

It is the view of the husband that he should have custody of the children. He objected to an amendment of the pleadings permitting a consideration of a college education for the oldest daughter. He asked that the court order Petitioner to pay his attorneys' fees and costs.

The above brief recital points up the sharp differences between the parties. One of the threshold questions is that of divorce and will be hereafter discussed.

DIVORCE AND ALIMONY

The wife has sought a divorce based on physical cruelty.

The facts are undisputed that an altercation took place in the family home on May 7, 1979. It is undisputed that the wife left the family home and went to the home of friends. The husband does not deny that the incident took place. It is his position that it was his right as a husband to have sexual

intercourse with his wife. He denied the degree of force described by the wife. The question before the court is whether or not this behavior is sufficient to constitute physical cruelty under the divorce act. The wife's description follows:

> A. . . . he shoved me backwards on the sofa, down on the sofa, and threw himself on top of me. It was very obvious what his purpose was even at that point, and I started begging him, please, to leave me alone, and I was struggling to get away, and I fell off onto the floor, but he was right there, and he wouldn't let me go. I kept trying to get away, and I kept pleading with him, please, please, don't do this to me. And, of course, I was able to move some until he jammed me up against the piano stool, you know, the leg or something there, and I smashed my head up against that, and then I couldn't get away anymore. I had no place to go. I was pleading, and he never said a word, and I was doing pretty good until he took his knee, you see he was on top of me, and he took his knee and he put it on that scar where the surgery had been done, and I couldn't stand that pain. I had to relax my position, and when I did, then he accomplished what he wanted. And then when he got through, you see he had had — I had gotten to the point I couldn't do anything even with my hands, because he had my hands all twisted across my throat and held down, and I was jammed against the piano, and when he did, when he put all of his weight down on my leg, it was awful pain, and when it was all through, he still held me down and he said, now, are you going to behave from now on or do you want me to do this again to you. (Dep. p. 105)

Mrs. Anderson left her home and went to the home of Mrs. Pence, one of her friends. Upon arrival at the Pence home Mrs. Pence described her as follows:

> A. . . . She was sitting crying, jerking in just a terrible state of shock. Her hair was all ruffled up, her

gown was torn, the sleeve was torn out of it, it was torn at the bottom. She had a big bruise over her right eye. She was just in a terrible fix. I have never seen anyone in such a condition. (Tr. 7, lns. 7-12)

Dr. Howell was called and he said:

I had seen Mrs. Anderson in September, 1978, for a complete physical evaluation. At this time she was found to be suffering from a painful right knee secondary to some arthritis in the right knee and a very sensitive nerve resulting from poliomyelitis which she had had in childhood. There was an area of extreme sensitivity just below the right knee apparently associated with a nerve problem from scar associated with previous corrective surgery and old poliomyelitis.

Around 3:00 a.m. on May 7, 1979, I was called on the phone by a friend of Mrs. Anderson asking me to see Mrs. Anderson. Mrs. Anderson was at the home of a married couple. When I arrived Mrs. Anderson was quite upset and crying. She related that her husband had forced her to have sexual relations with him against her will and had struggled with her. (Ex. P-6)

Dr. Howell saw, examined and treated her that night and subsequently.

This was not the first nor only such incident. Additional incidents, and the circumstances, are related by Mrs. Anderson using the following words.

A. I have to state certain things first. I have a problem with my right leg that results from polio that I had when I was a child, and from time to time it reoccurs. Different things have happened to cause me great pain. In August of — well, I injured this knee the year before that and had been living with much, much discomfort, which greatly increased about mid-summer year before last . . . Bunny really didn't seem to comprehend the extent of my

pain during all this time, and at the same time this cervixitis had flared up again. . . . (Dep. 94-95)

* * *

I felt like that I was more of a physical object to Bunny than a person, and his attitude during this time just absolutely solidified it, and to be considered an object is a little hard to take. My response to him became less and less, and one thing went to another, and his resentment grew, and this just kept brewing through the fall and then in the winter — it was a night in January both of the big girls had gone to a ball game, and Trisha was there — the nine-year old — with us, and I had gone into the bedroom that Bunny used to get something. I don't know what. This was like 7:30, 8:00 at night, you know, and Bunny came around there where I was and closed the door and was very persistent on making sexual advances. He picked me up and he threw me on the bed and managed to remove my clothes, and at one time our little girl knocked on the door, and he told her he would be out in a little bit and to go ahead and watch TV or whatever. I didn't make any answer, because I really couldn't. At that time I was too emotionally upset, and he persisted in having intercourse much over my protest, and when all was over he just got up just like you would get up and walk out of here and went in and proceeded to play with Trisha. (Dep. 95-96)

* * *

A couple of days later I tried to talk to Bunny, and I told him that was the most horrible feeling to be less than human or considered less than human, and I told him quite plainly that if he ever did that again I would leave him. And he laughed. He laughed. Later on, I think it was the end of March, April, the first of April, he came in the kitchen one morning, and he often came in the kitchen when I was preparing breakfast and all, and on one occasion — I don't know whether it was before or after

this next incident — I can't tell you — he was angry because I did not respond at 7:00 in the morning to whatever, and he took one of my dinner plates and just smashed it on the floor. Of course, the children were aware of this. They were aware of many nights when he would come in where I was supposed to be sleeping, and these long, long discussions would go on endlessly into the night, but on this particular morning that I'm talking about Bunny took me by my shoulders and steered me. I was walking backwards and stumbling, I guess is the best word for it, backwards, and he directed me through the kitchen, through the dining room into the living room and in the process I fell backwards on my back, because he was pushing so hard, and the next thing I knew he had plopped himself hard down on top of me there on the floor. I must have been making an awful lot of noise, but the girls were up anyway getting ready for school, and I was trying so desperately to get away from him and suddenly he lossed his grip on me, and the reason he did was because our sixteen-year-old daughter had come into the room. I didn't know she was there until she beat him hard on the back to make him release me. I don't know who was more hysterical — her or me. I was so mortified that she had witnessed much a God-awful thing, and she was so pitiful. (Dep. 97-98)

Dr. Steude, during the course of his testimony in relating his findings with respect to his examination of Mr. Anderson, describes the matter as his getting angry and his feeling rejected by her, that he was very angry, that he handled it in a controlled way for a while and then "... finally felt that it was his right as a husband to have sex with his wife. He saw that as her being angry with him and withholding, and in subsequent examinations, it was quite clear that there was some force involved; that it was probably a breakthrough of pentup angry feelings." (Tr. 7, lns. 9-13)

Dr. Steude described Mr. Anderson as having "... some significant passive aggressive tendencies in his personality," (Tr. 8, ln. 7) and says that he has other ways of dealing

with anger but has an inability to adapt to new situations and that "... therefore, there is some degree of pathology there. (Tr. 8, lns. 20-25)

The evidence is clear and convincing that on some three (3) different occasions Respondent sought to forcibly have sexual relations with Petitioner and succeeded twice.

The question now for the court is whether these facts meet the test laid down in *Brown vs. Brown*, 215 S.C. 502, 56 S.E.2d 330 (1949). In that case the court stated:

> Physical cruelty, as used in divorce law, has generally been defined by our Courts as actual personal violence, or such a course of physical treatment as endangers the life, limb, or health, and renders cohabitation unsafe. With this definition, we are in accord. In determining what acts constitute cruelty under our statute authorizing a divorce, regard must be had, not only to the provisions of the statute, but also to the circumstances of each particular case.
>
> Continued acts of personal violence producing physical pain or bodily injury and a fear of future danger are recognized as sufficient cause for divorce for cruelty in nearly all jurisdictions, especially where accompanied by other acts of ill-treatment. 27 CJS, *Divorce*, Section 26, page 549. It is not every slight violence, however, committed by the husband or the wife against the other, even in anger, which will authorize divorce.
>
> It is generally held that a single act of physical cruelty does not ordinarily constitute ground for divorce, unless it is so severe and atrocious as to endanger life, or unless the act indicates an intention to do serious bodily harm or causes reasonable apprehension of serious danger in the future. A single act of aggravated cruelty may, however, warrant a divorce, if accompanied with such precedent or attendant circumstances as to satisfy the Court that such acts are likely to be repeated. (Citations omitted) 56 S.E.2d at 333, 334.

While statement of the foregoing Rule applied to divorce actions, predicated upon allegations of physical cruelty is fairly simple, it is the application of the Rule to

particular cases which creates the guidelines within which the Family Courts of this state must work.

Marriage, of course, carries with it the mutual privilege and mutual pleasure of sexual intercourse. This privilege is not absolute but is qualified by considerations of health and decency. 41 CJS2d Section 11 states that:

> The duty of cohabiting, of living together, carries with it the right to sexual intercourse. The right is, of course, not absolute, but is qualified by considerations of health and decency.
>
> The law does not recognize the right in the husband to use physical force to control the acts and will of his wife nor to compel her to obey his wishes.

In *Smith v. Smith*, 248 N.J. Super. 219, 372 A2d 386 (1977) the court stated that "how can one logically defend the result, that a husband has an unbridled right, protected by law, to force himself sexually upon his wife at any time he chooses no matter how far the marriage relationship has deteriorated between them. Truly, society should not suffer such a situation to continue upon so callous a basis as application of contract law and the doctrine of consent."

Our courts have recognized the importance of mutual consent to marital sex and the right of a married woman to resist overtures by her husband to have sexual relations. See *State v. Bateman*, 113 Arizona 107, 547 P2d 6 (1976).

There is an annotation on this topic which treats of the matter exhaustively. It is found at 88 A.L.R.2d commencing on page 555. A summary found on page 555 says the following:

> A spouses' insistence on excessive or otherwise unreasonable sexual intercourse, injurious to the health of the other spouse and not consented to by the latter, constitutes cruelty or indignities within the meaning of statutes making cruelty or indignities a ground of divorce or separation.

At page 556 the annotation says:

> And as we said in *Hines v. Hines* (1921) 192 Iowa 569, 185 NW 91, the court said that 'a wife has the right to

> protect her health and her life from the ungoverned lust of her husband by seeking a divorce. Such an action presents as strong a case for relief as when she flees from his intolerable cruelty inflicted by other means. It is personal violence under another name and cannot be justified under the claim of the exercise of his marital rights.'

Notwithstanding the foregoing, it is the court's view that the facts in this case do not measure up to the standard required in the *Brown* case.

The parties have been separated for a period of almost two (2) years now and it is apparent that the marriage is dead, Petitioner wants a divorce and Respondent has now asked for a divorce based on "no fault." After fully considering the matter it is the court's view that since both parties want the marriage ended, it is better that it should be dissolved based on "no fault" and a divorce is granted on that ground.

The court now must consider the question of whether or not the wife is barred from receiving alimony. The law is plain and the doctrine clear that unless the wife is guilty of disqualifying fault in causing the disruption of the marital relationship she is not disqualified from suppoort and maintenance.

In *Welch v. Welch*, 250 S.C. 264, 157 S.E.2d 249, the court in approving support said:

> As to what constitutes fault which would bar wife from separate maintenance and support, this Court in *Miller v. Miller*, 225 S.C. 274, 82 S.E.2d 119 (1954), recognized that most marital difficulties are, to some extent, the fault of both parties and approve the rule that the wife need not be blameless in order to recover. Relief should be denied to her on this ground only if she was guilty of substantial fault or misconduct "which materially contributed to the disruption of the marital relation or induced the action by the husband upon which she relies to justify their separation."

The court by consent order had the parties and the children seen, examined and evaluated by Dr. Philip G. Steude, a physician practicing psychiatry in Columbia. Dr.

Steude, among other distinctions, holds membership on the American Medical Association's American Board of Psychiatry in Neurology and the American Board of Psychiatry in Neurology with Child Psychiatry. He was agreed by both Petitioner and Respondent to be qualified. The court recognizes his qualifications and expertise. His testimony has been very helpful and the court finds his opinions to be credible.

Dr. Steude found that Respondent wanted to put Petitioner down, that he suffered from depression, had difficulty controlling his anger and was narcissistic in his relationship with his children. He stated that he had significant passive aggressive tendencies and some mild suicidal ideation. He felt the children must do his will. Dr. Steude found that he was more involved with his parents than with his own family. He found that his emotional state was unable to maintain a sense of equilibrium, with a resulting loss of functioning in terms of internal stress, depression and so on. He showed symptoms of this in Dr. Steude's office and had had even more severe symptomatology in the past.

Dr. Steude found that Mrs. Anderson was very concerned with the children and their relationship with their father. He found that Mr. Anderson belittled Mrs. Anderson and made her feel like a "zero," like nothing.

Dr. Steude reports that the children perceive the father as being dishonest, setting them up badly and otherwise mistreating them and their mother.

It is important to note that Dr. Steude was appointed by the court on application of Respondent.

According to Dr. Steude, Mr. Anderson's behavior constituted mistreatment of his wife and children. He ignored them in favor of his family. This opinion by Dr. Steude coincides with Mrs. Anderson's testimony.

After considering all of the evidence and testimony I fail to find any justification for the denial of alimony to Petitioner.

Traditionally, in determining an award of alimony, the Family Courts of this State are required to consider such factors as the financial condition of the husband, the needs of the wife, the health and age of the parties, their respective earning capacities, the amount the wife has contributed to their wealth, the standard of living the wife is accustomed to

at the time of the divorce, and the conduct of the parties. *Powers v. Powers*, 273 S.C. 56, 254 S.E.2d 291 (1970). These factors, however, are not intended, by any means, to be all inclusive. With the advent of *Orr v. Orr*, U.S. 268 (1979), the first two (2) factors must be redefined to include the financial condition of the parties and the needs of the parties.

One of the first issues then is a determination of the value of the Anderson family assets and legal title to them.

During the trial a great deal of time was devoted to assisting the court in determining the fair market value of the family assets.

VALUATION OF ANDERSON FAMILY ASSETS

The Anderson family assets fall into five (5) general categories for valuation purposes. The largest category by value is real estate. The real estate is listed on Schedule A of the appendix attached hereto and made a part hereof. Except for real estate values agreed upon by the parties I have used as the basis of my opinion of value the appraisals of Robert M. Hulsart of Florence, Timothy G. Dargan and William E. Flowers both of Darlington. These witnesses were called by Petitioner. I find Mr. Hulsart to be a credible witness. He has been in the real estate business for practically his entire adult life. He has lived in and around the Pee Dee section for a considerable period of time and is familiar with properties in this area. Since 1969 he has devoted his efforts primarily to appraising property as a self-employed real estate appraiser. He is a member of the American Institute of Real Estate Appraisers and is a senior real estate appraiser, member of the Society of Real Estate Appraisers, and is an active member of the Florence Board of Realtors. He has done numerous appraisals for the South Carolina Highway Department, the Housing Authority of Florence, the U. S. Department of Justice, the U. S. Internal Revenue Service, the South Carolina Department of Parks, Recreation and Tourism, Florence County and other state, local and governmental entities, as well as mortgage lenders, banks and corporations. He has frequently appeared in court to testify concerning real property values.

The timber was valued by Mr. Timothy Dargan and Mr. William E. Flowers. Both of these witnesses are registered

foresters and employed by Lucus M. Dargan and Associates, consulting foresters in Darlington, South Carolina. Both have had many years of experience in appraising timber land. They have appraised timber lands for corporations, individuals, estates and others. Through their appraisals, and in reliance upon them, timber companies buy timber.

Neither of the witnesses have any interest in the outcome of this proceeding. Neither knew Petitioner prior to their appraisals, and there is no evidence indicating any relationship between the witnesses and Petitioner's attorneys.

On the other hand, the appraisers as to real estate value produced by the Respondent consisted of himself and an employee of the South Carolina Tax Commission assigned to the Real Estate Division. This witness has never been in the real estate business, has done no professional appraisals, and is a full-time State employee. No timber appraiser was produced except as to one tract and this witness made no cruise of the property and agreed that the best way to ascertain the value of the timber was by a timber cruise.

I have carefully considered the testimony on values, observed the parties and the witnesses upon the witness stand, judged their demeanor, appearance, interest, qualifications, experience and the nature of their testimony. Based on the foregoing, I find and conclude that the real estate owned by the Anderson family has a fair market value of Six hundred twenty-four thousand five hundred and no/100 ($624,500.00) dollars.

The other assets consist of bank accounts, certificates of deposit, savings accounts, etc., and are in the nature of liquid investments. These deposits had a value of One hundred twenty-nine thousand one hundred thirty-four and 45/100 ($129,134.45) dollars as of May 1, 1979. Between then and the date of separation additional interest would have accrued, but I have ignored that interest for the purpose of this discussion. Obviously, this asset has as its value its face value.

There were four (4) insurance policies with cash value, as of May of 1979, of Sixty-six hundred fifty-four and 59/100 ($6,654.59) dollars.

Additional substantial assets were two (2) retirement plans, one (1) provided by the U. S. Department of Agriculture for Mr. Anderson, and the other provided by Equitable Life Assurance Society for Mrs. Anderson. These assets were appraised by Dr. Travis Pritchett. His method of appraisal and a discussion of them is had in the latter part of this opinion. I find and conclude that the retirement plans have a total value of One hundred fifty-one thousand seven hundred fifty-eight and no/100 ($151,678.00) dollars as of May, 1979, divided One hundred thirty-five thousand seven hundred fifty-eight and no/100 ($135,758.00) dollars for Mr. Anderson's plan and Fifteen thousand nine hundred twenty and no/100 ($15,920.00) dollars for Mrs. Anderson's plan.

Farm equipment is listed on Mr. Anderson's 1979 tax return as having a value of Thirty-six thousand four hundred ninety and no/100 ($36,490.00) dollars, and I find and conclude that this is a conservative approach to its value and adopt that value for the purposes of this Order.

Other assets consist of household goods. I find and conclude that these household goods consisting of furniture, furnishings, china, crystal and silver have a value of Seventy-three hundred forty-two and 10/100 ($7,342.10) dollars.

The total value of the Anderson family assets come to Nine hundred fifty-six thousand six hundred seventy-six and no/100 ($956,676.00) dollars. The assets held by Mrs. Anderson total Fifty-four thousand six hundred twelve and no/100 ($54,612.00) dollars; Mr. Anderson holds the balance of the assets in his name with a total value of Nine hundred two thousand sixty-four and no/100 ($902,064.00) dollars.

At the time of separation there was cash in banks, CD's, etc, totaling One hundred twenty-nine thousand one hundred thirty-four and 45/100 ($129,134.45) dollars. Of that amount One hundred twenty-six thousand two hundred sixty-two and 64/100 ($126,262.64) dollars was held in the name of Petitioner and the children on the one hand and with the Respondent on the other in an "or" account. Respondent held in his name exclusively only Two thousand eight hundred seventy-one and 81/100 ($2,871.81) dollars. With the "or" accounts he had the legal authority to transfer the accounts; he had or obtained possession of the pass books and promptly after separation did so.

There have been some changes in the form of some of the assets and Respondent has spent some of the money on this litigation, but I find and conclude that there are assets now of approximately Nine hundred fifty-six thousand six hundred seventy-six and no/100 ($956.676.00) dollars with approximately Nine hundred two thousand sixty-four and no/100 ($902,064.00) dollars in the name of Respondent and Fifty-four thousand and no/100 ($54,000.00) dollars in the name of Petitioner.

Some of the assets will have increased in value sufficient to offset any decrease in the cash expended by Respondent. For instance, the cash value of the insurance policies, the retirement plans, etc., has increased. There is no clear evidence of the precise amount of cash remaining.

Petitioner has provided evidence showing a total need for her and the three (3) children of Two thousand two hundred ten and 92/100 ($2,210.92) dollars per month before taxes on any periodic payment of alimony. This included a six (6%) percent factor for inflation which I am disallowing in all of my considerations.

Rather than award monthly alimony to Petitioner, I feel a single award of a gross sum to be more appropriate. My view of this is influenced by all the testimony and evidence, including Dr. Steude's concern that Respondent might not provide adequately for the family, the Respondent's activity in transferring assets which he controlled away from his family, the strife and hostility which continuing contact through periodic payment of alimony might bring, the court's desire to avoid future litigation with respect to changes in amounts, and many other factors proper to be considered in the discretion of the court.

Lump sum alimony is authorized by § 20-3-130 *South Carolina Code* 1976 and has been approved by our court in *Jones v. Jones*, 270 S.C. 280, 241 S.E.2d 904 (1978), and a plethora of other cases.

In considering an appropriate gross award of alimony, I have reviewed all of the factors proper for consideration and have also considered the equitable division of property hereinafter discussed in more detail, child support to be awarded to the children, the tax consequences of each award, as well as the decision in *Orr v. Orr*, 440 U.S. 268 (1979). After fully

considering all those factors, I believe that an award of Sixty-five thousand and no/100 ($65,000.00) dollars payable by the husband to the wife would be fair, just and reasonable, and I order that the sum be paid in gross as full and final satisfaction of any claim for alimony.

CHILD CUSTODY

Both parties have asked for custody of the children. They have lived with their mother since the separation, pursuant to a prior Order of the court. The welfare of the children, and what is for their best interest, is the primary, paramount and controlling consideration in this and all controversies between parents as to their custody. *Adams v. Miller*, 253 S.C. 118, 169 S.E.2d 391 (1969); *Mixon v. Mixon*, 253 S.C. 436, 171 S.E.2d 581 (1969); *Powell v. Powell*, 256 S.C. 111, 181 S.E.2d 13 (1971). The wishes of the children, although not controlling ordinarily, are entitled to great weight in awarding their custody as between estranged parents. *Guinan v. Guinan*, 254 S.C. 554, 176 S.E.2d 172 (1970).

I talked privately with the children as provided for in the Family Court Rules. They want to live with their mother.

Dr. Steude's opinion was "they should all be placed with the mother." A review of Dr. Steude's psychiatric evaluation disclosed that Respondent upsets the children, makes them nervous, threatens them, tries to make them feel guilty and loses his temper while dealing with them. On one occasion he threw car keys at one child, and on another occasion became angry with his older daughter and held her upside down for awhile. Dr. Steude gave his opinion that that was very traumatic for her.

It is clear that the welfare of the children require that the mother have their care, custody and control, subject, however, to mandatory reasonable visitation privileges.

SUPPORT FOR THE CHILDREN

Mrs. Anderson has produced evidence showing needs of something over Two thousand and no/100 ($2,000.00) dollars per month before taxes, or a pre-tax need of Five hundred twenty-one and 40/100 ($532.40) dollars per person per month. Based on the evidence in the case I believe Seventy-five and no/100 ($75.00) dollars per child per week for the two

(2) younger children and One hundred and no/100 ($100.00) per week for the older child plus payment of all medical, dental and optical bills is a fair and reasonable contribution from Mr. Anderson toward the support of the children. This is less than the amount sought, but I have taken into account contributions which Mrs. Anderson should make toward their support. The payment of this sum is well within the ability of Mr. Anderson to meet. He will have net assets in excess of a half million dollars after all awards made in this Order, and income from his employment of something over Twenty-seven thousand and no/100 ($27,000.00) dollars per year in addition to income from his farming operation and other sources, and substantial income upon retirement.

COLLEGE EDUCATION FOR DANA

During the course of the trial the Respondent strenuously objected to a consideration by the court of a college education for the oldest daughter, Dana. When the initial pleadings were filed in 1979, some two (2) years ago, Dana was a sophomore and the pleadings did not specifically ask the court to consider the cost of a college education for her. When the question came up in October of 1980, the husband objected to any testimony or evidence thereabout. Petitioner moved to amend the pleadings and, over objection of Respondent, the Motion was granted.

It is the wife's position that Dana is an honor student with an average grade in school for her high school years of over ninety (90), that she has been accepted at several colleges and has been recommended for college by her high school principal, and wants to go to college.

In his brief Respondent argues that her first choice of college is too expensive, that her choice is a poor one, that she should attend a technical school, that she is not yet ready to go to college, that she could afford to pay for her own college education, and that in any event there are "no exceptional circumstances" to justify the discretion of the court in requiring that the father financially contribute toward the daughter's education.

I find that Dana is an honor student, that she has an average grade in all of her high school of over ninety (90), that she has been accepted at both Anderson College and at

Winthrop College, that her high school principal has recommended that she go to college, that she is a member of the Beta Club, a national high school honor society, and that her parents and her grandparents were college educated.

Dr. Steude predicted in July of 1980 that Mr. Anderson would withhold college support for the children.

Section 14-21-810 (b) (4) *South Carolina Code* as interpreted by *Risinger v. Risinger*, _____ S.C. _____ 253 S.E.2d 652 (1979) provides that a Family Court judge may require a parent to contribute the amount of money necessary to enable a child over eighteen (18) to attend high school and college where the characteristics of the child indicate that he or she will benefit from college and when the parent has the financial ability to help pay for the education. I find that the requirements of the statute and the cases interpreting it have been met here. The question now becomes what degree of support is necessary beyond Dana's eighteenth (18th) birthday to provide for her continued education. I recognized that to the extent the mother is able to contribute she should also assist with this expense. After considering the matter I believe the continued payment of One hundred and no/100 ($100.00) dollars per week for so long as Dana is enrolled in and pursuing an education at an accredited school, college or university is fair and reasonable and I Order that the payments be continued during this period of time. This is in essence the continuation of support until Dana stops school, until her grades are no longer satisfactory, until she graduates after four (4) years of college or gets married.

The court will not attempt to approve or disapprove the specific choice of colleges under consideration by the daughter. No evidence has been introduced tending to show that her judgment thereabout is unsound.

VISITATION PRIVILEGES

A discussion of this issue would not be productive. The temporary Orders thereabout previously passed should be, and they hereby are, revoked. It is suggested that the parties exert every effort to come to a congenial understanding with respect to visitation privileges. Liberal visits are encouraged. In the absence of some superseding agreement between the parties, the husband is granted the right to visit the children

every other weekend at the same hours at which the visits now take place. The visits shall in the absence of agreement take place away from the family home and the Respondent shall pick them up and deliver them from that location, unless some other location is agreed upon.

The Respondent has charged that Petitioner sought to alienate the children from him. The court finds no evidence to support that allegation.

It is apparent that the relationship between the children and their father needs improving. The mother and the children have indicated their desire to cooperate in this endeavor. Dr. Steude made certain recommendations on how this could be accomplished. The court is reluctant to order the implementation of his recommendations, but commends to the Respondent his suggestions and recommends that they be implemented.

It is further provided that should the children fail or refuse to visit with their father as herein provided, all payments for their support or education shall cease.

EQUITABLE DIVISION

Both parties have asked for an equitable division of the family assets. Family Courts in South Carolina find their authority for making division of real and personal property of the marriage at *South Carolina Code Ann.* Section 14-21-1020 (1976), as amended, (1980 Supp.) which provides as follows:

> The court shall have all power, authority and jurisdiction by law vested in the Circuit Courts of the State in actions for divorce of *a vinculo matrimonii*, separate support and maintenance, legal separation, and in all other marital litigation between the parties, *and for settlement of all legal and equitable rights of the parties in such actions in and to the real and personal property of the marriage* and attorney's fees, if requested by either party in the pleadings. (Emphasis added)

Our Supreme Court firmly established the doctrine of equitable division in the case of *Simmons v. Simmons*, ____ S.C. ____, 267 S.E. 2d 427 (1980). The court there affirmed an

award by Judge Powell, sitting in Spartanburg County, of a twenty-three (23%) percent interest for an adulterous wife in her husband's property. In that decision the court gave further defisnition to the meaning and application of the doctrine.

Prior to the enactment of S.C. Code Ann. Section 14-21-1020 (1976) as amended, (1980 Supp.), there was no statutory authority in this State allowing Family Courts to make division of real or personal property. In the case of *McKenzie v. McKenzie*, 254 S.C. 372, 175 S.E.2d 628 (1970), the South Carolina Supreme Court briefly addressed the wife's contention that the Circuit Court erred in failing to award her any interest in "any part of the property acquired by the parties during their twenty-five (25) years of marriage." The Supreme Court noted that the wife's claim was apparently based in reliance of ". . . the doctrine that a wife who has made a material contribution toward the acquisition of property by her husband during coveture acquires an equitable interest therein, which, according to some authorities, will be recognized on divorce. See 27 B C.J.S., *Divorce*, Section 293, page 272 (1959); 24 Am. Jur. 2d, *Divorce and Separation*, Section 928, page 1057 (1966)."

In case of *Moyle v. Moyle*, 262 S.C. 308, 204 S.E.2d 46 (1974), also decided before an enactment of the referenced statutory authority, the South Carolina Supreme Court addressed the husband's argument that the lower court erred in awarding the wife a $25,000.00 one-time payment in addition to periodic alimony and in requiring the husband to give the wife a certain life insurance policy. The Supreme Court noted that the $25,000.00 payment to the wife was apparently directed by the lower court due to her indirect contribution "to the financial success of and the acquisition of property by the husband." The Supreme Court went on to affirm the lower court decision, stating that the issues in *Moyle* did not raise a challenge to the power or jurisdiction of the lower court to divide the property owned by the parties in an equitable manner, further stating that the parties' voluntary submission of this issue to the lower court conferred jurisdiction upon the court to adjudicate that issue.

While both *McKenzie, supra*, and *Moyle, supra*, were decided prior to the enactment of the current statutory au-

thority for the Family Courts of this State to make division of "the real and personal property of the marriage," Respondent draws this court's attention to the fact that in both cases the South Carolina Supreme Court strongly intimated that the primary consideration in making such a division was the wife's "material contribution toward the acquisition of property by her husband during coveture" (*McKenzie*, 175 S.E.2d at 630) or the wife's indirect contribution to the financial success of, and the acquisition of property by the husband (*Moyle*, 204 S.E.2d at 47).

In *Wilson v. Wilson*, 270 S.C. 216, 241 S.E.2d 566 (1978), the South Carolina Supreme Court remanded the case to the lower court for a determination of the extent of the wife's equitable interest in the husband's properties. The Supreme Court stated that the record left no doubt that the wife had materially contributed to the financial success of her family and the acquisition of property by her husband. The court went on to note that the wife had been employed since 1951 and that at one time she worked in a business owned by her husband at a low salary. The Supreme Court stated that her efforts, plus the expenditure of her income for household expenses, not only contributed to the material success of the family, but also freed her husband's earnings for investment. The court determined that "under these circumstances, Mrs. Wilson is entitled to the equitable ownership of a portion of the properties held by Mr. Wilson."

While frequently cited as authority for the doctrine of equitable division in this State, the case of *Risinger v. Risinger*, 273 S.C. 36, 253 S.E.2d 652 (1979), disposed of the equitable division issue under Rule 23 of the *Supreme Court Rules of Practice*. The opinion simply states: "There was ample evidence from which the Judge could have concluded that the property division was equitable under the Rule in *Wilson v. Wilson* (Citation omitted)."

In a series of recent cases, various aspects of property division in the State of South Carolina were discussed; however, none of these cases shed any particular light upon what factors a court should consider in reaching its decision on this issue. See *Mason v. Mason*, 272 S.C. 268, 251 S.E.2d 198 (1979); *Ingram v. Ingram*, 273 S.Cd. 113, 254 S.E.2d 680 (1979); *Edens v. Edens*, 273 S.C. 303, 255 S.E.2d 856 (1979); *Levy v. Levy*,

_____ S.C. _____, 264 S.E.2d 834 (1980); and *Stone v. Stone*, _____ S.C. _____, 266 S.E.2d 71 (1980).

In *Poniatowski v. Poniatowski*, _____ S.C. _____, 266 S.E.2d 787 (1980), the South Carolina Supreme Court considered a lower court order requiring the husband to transfer his interest in a bookstore to his wife. The Supreme Court noted that the bookstore was purchased with joint funds, that both parties had worked in the bookstore until the onset of marital problems, and that the wife had only ceased working there at the husband's request. The Supreme Court record revealed that the wife presented evidence of her contributions to the business. The Supreme Court upheld the lower court decision stating, "Moreover, in view of the finding, the bookstore was purchased with joint funds and operated by the parties' joint efforts, the award of the bookstore could be considered as a further division of jointly-owned assets." In making its decision the Supreme Court specifically referred to *S. C. Code Ann.* Section 14-21-1020 (1976), as amended, (1980 Supp.).

The most recent case in this State on the question of equitable division is *Simmons v. Simmons*, _____ S.C. _____, 267 S.E.2d 427 (1980), in which the South Carolina Supreme Court upheld a lower court decision awarding a wife a twenty-three (23%) percent equitable interest in the marital residence and surrounding acreage to which the husband held legal title. The principle issue in that appeal was whether the wife was barred from equitable division by virtue of her adulterous conduct. The Supreme Court held that a spouse who was otherwise entitled to an award of a special entity in property acquired by his or her spouse during coverture is not barred from receiving that property on the basis of his or her adulterous conduct. In reaching this decision, the South Carolina Supreme Court notes, "A special equitable interest is, by nature and definition, distinct from alimony. (Citation omitted). A creature of equity is a property right earned by the industry and labor of the wife during the marriage. (Citation omitted)."

In *Simmons*, the South Carolina Supreme Court also noted: "In the case of *Wilson v. Wilson* (Citation omitted), we adopted the doctrine entitling a wife to a special equity in the husband's property acquired during coverture where the wife

has made a material contribution to the acquisition through her efforts."

It is my view of the law of this State that Petitioner's interest in the marital property which is subject to division by this court must be determined based upon her labor and industry during the marriage and not upon an individual's mere presence as a partner or spouse at the point in time when property is acquired by the other spouse.

The South Carolina statute vests in the Family Courts of this State the power, authority and jurisdiction to settle "... all legal and equitable rights of the parties ... in and to the real and personal property of the marriage ..." This language is similar to the New Jersey statute enacted approximately ten (10) years ago as N.J.S. 2A: 34-23. In that statute, in addition to alimony, the New Jersey courts were empowered "... to effectuate an equitable distribution of property, both by them or either of them during the marriage." In interpreting that statute the New Jersey courts have held that all property, regardless of its source, in which a spouse acquired an interest during the marriage is eligible for distribution upon divorce. This includes property acquired by way of gift, bequest, devise or descent. *Painter v. Painter*, 65 N.J. 196, 320 A2d 484 (1974).

Although the argument that the South Carolina courts should follow the New Jersey lead is persuasive, the cases which I have previously cited lead me to believe that the better view, and the view which is most likely to be adopted by our Supreme Court excludes inheritance and intrafamily gifts from marital property. Property held at the time of marriage should also be excluded.

Another issue relates to whether or not increases in the value of property received through gifts and inheritances by reason of inflationary pressures should be excluded from marital property.

The New Jersey court in *Rothman v. Rothman*, 65 N.J. 291, 228 320 A.2d 496 (1974), approved a three step procedure in "equitable distribution" cases: (a) the court first decides what specific property of each spouse is eligible for distribution; (b) the court then determines its value for purposes of such distribution; (c) the court must then decide how much such allocation can most equitably be made. One problem to

be confronted is the value and distribution of the husband's retirement plan.

Both parties have retirement plans. There is no dispute as to the value of the wife's retirement plan. It has an agreed value of Fifteen thousand nine hundred twenty and no/100 ($15,920.00) dollars.

The value of the husband's plan is in sharp dispute. The husband takes the position that the value of his plan is worth Sixteen thousand three hundred forth and no/100 ($16,340.00) dollars. The wife takes the position that its value, as of May, 1979, was One hundred thirty-five thousand seven hundred fifty-eight and no/100 ($135,758.00) dollars.

The difference in the figures rests in the fact that the husband's figure is the amount which he would receive if he terminated his employment, forfeited all employer contributions to the retirement plan, and only sought a cash refund of his employee contributions. Obviously, to do so would be economically irrational in view of the fact that he has worked under the Civil Service Retirement System since 1960 and can retire in 1991 with a retirement benefit of approximately Twenty-eight thousand and no/100 ($28,000.00) dollars per year for the remainder of his life expectancy. There is a 92.5 percent likelihood that he will survive until 1991, and he is then expected to receive benefits for twenty (20) years. Benefits will increase with inflation each year.

Fortunately, the court has much precedent to go by in making a decision on this point. The issue has been litigated in both community property states and common law equitable distribution jurisdictions. The most recent decision to come to the attention of the court is the case of *Kikkert v. Kikkert*, a New Jersey Superior Court, Appellant Division, case reported in the *Family Law Reporter* for April 28, 1981. The case followed the view that a vested pension is a right acquired during the marriage and therefore is a marital property subject to division.

There, as in this case, was the difficulty of proof of present value as of the date of separation. There, as here, a qualified expert established the present value of the plan. There, as here, ultimate enjoyment of pension benefits depended upon survival of the employee, and there, as in the

present case, present value considerations included acturial computations based upon life expectancy tables.

The *Family Law Reporter* had this to say from a digest of the case:

> Although fixing present value under such circumstances may be difficult and inexact, nevertheless, immediate final resolution of the method of distribution is to be encouraged, preferably by voluntary agreement whenever possible. Long-term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible. This goal may be best accomplished, if a present value of the pension plan is ascertainable, by fixing the other spouse's share thereof as adjusted for all appropriate considerations including the length of time the pensioner must survive to enjoy its benefits, to be satisfied out of other assets, leaving all pension benefits to the employee himself. 7 F.L.R. 2412

In the present case evidence of the present value of retirement benefits came from Dr. S. Travis Pritchett, Professor of Finance and Insurance at the University of South Carolina. Dr. Pritchett has a long and distinguished career in finance and insurance. Among other honors and professional activities he is the sitting president of the American Risk and Insurance Association, and has written and published in professional journals numerous articles on employee benefits, retirement plans, retirement income and other financial and economic aspects of insurance mechanisms, demonstrating to the court his expertise in this field. In his evaluation of the retirement plan he took into account all of the factors necessary to arrive at the vested value of Mr. Anderson's retirement benefits as of May, 1979. He calculated these benefits based on the earliest possible retirement for Mr. Anderson at age fifty-five (55). The present value of One hundred thirty-five thousand seven hundred fifty-eight and no/100 ($135,758.00) dollars only reflects benefits earned during the period of marriage. The benefits earned during the period of marriage will be fifty-three (53%) percent of the

total benefits which can begin at age fifty-five (55). The present value of these total benefits is Two hundred fifty-three thousand eight hundred and fifty-five ($253,855.00) dollars.

The winter issue of the *Family Law Reporter*, published by the American Bar Association's section on family law, has an article commencing at page 271 on this issue. In cites equitable distribution states which support the position which the court takes here.

In many cases where the owner of the plan has not retired or is not receiving retirement benefits, courts make awards of a portion of the benefits payable upon retirement. One such case was *Malone v. Malone*, 587 P.2d 1167 (Alas. 1978), where that court held that even though a husband was not retired or now receiving benefits an award of Three hundred fifty and no/100 ($350.00) dollar per month to the wife as her share of the Federal Civil Service retirement benefits was proper. Similarly, an Illinois court *In Re: Marriage of Hunt*, 397 N.E.2d 511 (Appellant Court 1979), reason that since retirement plan payments are deferred compensation earned during the working years, and if the employee spouse was married while working, it is only logical that the right to such payments should be treated as property "acquired" during the marriage.

The Oregon court in *Rogers v. Rogers*, 609 P.2d 877 (Oregon Court of Appeals 1980) held that United States Foreign Service retirement benefits are marital assets to be considered in a dissolution proceeding. The court noted that most states — common law and community property — subject retirement plan benefits to equitable distribution at divorce.

One of the reasons the court awarded alimony in gross was to avoid strife and hostility between the parties in the future. Having found that the retirement plan constituted marital property to the extent of its fair market value, and where as here, there are other assets for equitable distribution, it is the court's judgement that an allocation of other property to the extent of the value of the interest in the plan is appropriate.

This court, therefore, finds and concludes that the United States Department of Agriculture's Civil Service Re-

tirement plan has a fair market value in May of 1979 of One hundred thirty-five thousand seven hundred fifty-eight and no/100 ($135,758.00) dollars, and that the plan to the extent of that value is included as marital property subject to division.

The appendix contains the court's determination of the value of assets and the way legal title is now held. It contains an itemization of the gifts and bequests to Mr. Anderson and assets held by him at the time of marriage. The value of the gifts and bequests at the time they were received have, in large measure, been agreed upon by the parties. The miscellaneous gifts and assets held at the time of marriage are as listed in the schedule. Respondent has argued that there were additional gifts and bequests. The burden of proving such gifts and bequests rests with him, however, and he has produced no clear, cogent and convincing evidence of other gifts. The gifts and bequests come to a total value of One hundred seventy-eight thousand sixty-four and 79/100 ($178,064.79) dollars. These gifts and bequests, however, are reduced by a gift in the form of estate taxes paid totalling Twenty thousand four hundred eight and 22/100 ($20,408.22) dollars, leaving a net value of gifts and bequests of One hundred fifty-seven thousand six hundred fifty-six and 57/100 ($157,656.57) dollars.

The Petitioner has argued that substantial contributions were made to the Anderson family by she and her husband after the marriage and before the death of Mr. Anderson. Substantial evidence of these contributions has been introduced. I find and conclude that they, in fact, did substantially help the Anderson family in developing and executing designs for draining wet fields, in designing and planning wind breaks to reduce soil losses, in areas of animal husbandry, that B. W. Anderson assisted with mechanical repairs and maintenance of vehicles, that he used technical skills to measure land for proper acreage, that he assisted in calibrations for planting, fertilizing and spraying, that the Anderson family managed the farm labor and coordinated activities, and these contributions largely as outlined by Petitioner, were substantial in nature and materially assisted in the increase of the value of the property inherited by Mr. B. W. Anderson.

The real estate given to Mr. Anderson or inherited by him had an agreed value as of the time of the gift or inheritance of One Hundred Fifty-four thousand nine hundred three and no/100 ($154,903.00) dollars. I find that it now has a value of Four hundred eighty-two thousand four hundred and no/100 ($482,400.00) dollars, or an increase of Three hundred twenty-seven thousand four hundred ninety-seven and no/100 ($327,497.00) dollars. There is no mathematical formula that will permit the court to divide the increase in value so as to come up with a precise amount for the inflationary factor and an exact amount for improvement to the land caused by improved agriculture techniques, proper maintenance of the farm, production of income and the labor, expertise and farming skill of the parties, and from the ongoing operation of a farming enterprise. It is obvious that the land has been substantially increased in value by reason of the labor, skill and efforts of the parties. I find and conclude that one-half (½) the increase in value has been brought about by the skill, expertise, knowledge, maintenance and operation of the properties by the parties and one-half (½) by inflationary factors. I therefore find and conclude that in addition to the value of the property at the time it was acquired, the increase in value caused by inflation is excluded from the marital property pot. One-half (½) of its increase in value amounts to One hundred sixty-three thousand seven hundred forty-eight and 50/100 ($163,748.50) dollars.

The value of property held may be summarized as follows:

Value of all property held		$956,676.53
Excluded:		
Property owned by Respondent at marriage		9,805.25
Gifts	$52,514.79	
Less Gift to Estate	20,408.22	
Net Gifts		32,106.56
Inheritance		126,550.00
Inflation on real property		163,748.50
Net Excluded		$332,210.31
Value of property for distribution		$624,446.22

Held by Mrs. Anderson	54,612.10
Held by Mr. Anderson	569,854.00

I have considered the health of both parties. Mrs. Anderson had polio as a child and from time to time must get around on crutches, and from time to time has limited mobility. Mr. Anderson is in sound health.

The primary responsibility for rearing the children has rested with Mrs. Anderson and this has inhibited, to some extent, the development of her career. She works as a school teacher earning Ten thousand and no/100 ($10,000.00) dollars per year. Mr. Anderson has unusual expertise as an agronomist and earns a salary of Twenty-seven thousand seven hundred thirty-five and 96/100 ($27,735.96) dollars per year, and in addition thereto, has engaged in farming operations, with the help of his wife, involving in excess of five hundred (500) acres of land. Mr. Anderson can, if he chooses, retire at age fifty-five (55) (ten [10] years from now) with an income of Twenty-seven thousand nine hundred seventy-four and no/100 ($27,974.00) dollars per year plus cost of living increases between now and then. Mrs. Anderson has no significant retirement benefits.

Mrs. Anderson produced evidence showing that she worked outside the home as an art teacher and school teacher for the entire married life except for short periods of time when she was bearing children or in school. She produced compelling and pursuasive evidence of the indirect contribution referred to by the court in *Moyle v. Moyle, supra.* She produced clothing which she had made, food which she had preserved, books which she had kept and other clear and convincing evidence of material contributions to the family's success. Her earnings and her indirect contributions freed her husband's earnings for investment.

The guidelines laid down in the *Simmons* case seems to grant the Family Court judge wide discretion. The court said, "This determination, like an award of alimony or attorneys' fees in action for divorce, *Nienow v. Nienow*, 268 S.C. 161, 232 S.E.2d 504 (1977), is one resting with the sound discretion of the family court."

Considering the contributions of the respective parties to the marriage, considering the award of alimony which I

have previously made, the tax consequences thereof and all other factors, I believe an award of additional property with a value of One hundred fifty-six thousand and no/100 ($156,000.00) dollars would be fair, just and equitable. Considering the value of the property already held by his wife this gives to her less than thirty-four (34%) percent of the marital property and more than sixty-six (66%) percent to the husband.

In my determinations I have not excluded gifts, bequests and inheritances from consideration in my award of alimony. I have excluded from consideration those factors in my determination of property to be equitably distributed between the two.

The award of alimony and the distribution of property under equitable distribution are so interrelated that the trial court should consider them together so that there is a balancing between the two. *Painter v. Painter, supra.* I have considered the alimony and the equitable distribution. Mrs. Anderson will receive Sixty-five thousand and no/100 ($65,000.00) dollars as alimony, One hundred fifty-six thousand and no/100 ($156,000.00) dollars tax free, or property having that value, and will retain property valued at approximately Fifty-four thousand and no/100 ($54,000.00) dollars. Mr. Anderson will retain property valued at something in excess of Six hundred eighty thousand and no/100 ($680,000.00) dollars.

The next issue involves a consideration of what property should go to which spouse.

I find and conclude that all property currently held by Mrs. Anderson should be her property. I next find that the outstanding one-half (½) interest in the family home and lot and the vacant lot in Bennettsville should go to Mrs. Anderson.

The award of alimony should be paid in cash. The remaining One hundred twenty-four thousand six hundred fifty and no/100 ($124,650.00) dollars may, at the option of Respondent, be paid either in cash or through transfer of any of the remaining other assets at the values found herein, provided they are transferred within thirty (30) days of the date of this Order. If assets are transferred then the assets shall be transferred at the value found, assuming that no

substantial change has been made in the nature of the asset, whether by cutting timber, removal of improvements or otherwise.

After reviewing all factors which I consider to be relevant, I believe the award as herein outlined does justice to the parties.

ATTORNEYS' FEES

The remaining issue relates to attorneys' fees. I find that the cost of the action, including attorneys' fees, witness fees and other costs, should be borne by the husband. The parties have agreed to defer consideration of the amount of these costs and fees until the Order of the court. Hopefully, the parties can reach agreement on costs expended, fees paid and a fair and reasonable fee for the attorneys representing Petitioner. I believe attorneys for Petitioner should prepare a statement covering services rendered and submit same to Respondent along with an itemization of costs paid out within fourteen (14) days of the date of this Order. In the meantime, and in order to avoid delay, I am requesting that the clerk schedule a day to take testimony, in the event the parties cannot agree, on the first convenient day, no earlier than thirty (30) days from this date.

RECONCILIATION

Prior to the first *pendente lite* hearing and before the commencement of taking testimony, and on other occasions during the course of the trial, I certify that the court made earnest efforts to reconcile the parties, but these efforts were to no avail.

CONCLUSION

After carefully considering the matter, it is ORDERED, ADJUDGED AND DECREED:

1. That the bonds of matrimony heretofore existing between Petitioner and Respondent be, and they are hereby, dissolved and ended on the statutory ground of No Fault.

2. That the findings, conclusions and awards made herein are made into the order and judgment of the court and the parties are ordered to comply therewith. The orders for the payment of money (other than child support) and the

transfer of property shall constitute a lien on assets of Respondent including real estate until satisfied and may be recorded as a judgment in any county in which Respondent owns property. All obligations including child support shall survive and be enforceable against Respondent's estate.

3. All remaining requests for relief not covered by this Decree are dismissed.

AND IT IS SO ORDERED.

s/S. Norwood Gasque
Chief Judge, Fourth Judicial
Circuit
Family Court

Bennettsville, South Carolina
May 18, 1981.

INVENTORY OF PROPERTY OF ANDERSON FAMILY

SCHEDULE A

REAL ESTATE

Asset	*Appraised Value*		*Now Held In Name of and Claimed By*	*Appraiser*
I. Real Estate				
A. Tract 1 (46 Acres - Marlboro)	Land	$ 28,300	B.W. Anderson	Hulsart
	Timber	10,000		Dargan
		$ 38,300		
B. Tract 2 (72 Acres - Florence)	Land ½	($118,800)	B.W. Anderson	Hulsart
		$ 59,400		Dargan
	Timber	100		
		$ 59,500		
C. Tract 3 (108.72 Acres - Darlington)	Land	$ 78,800	B.W. Anderson	Hulsart
	Imp.	2,500		Dargan
	Timber	16,000		
		$ 97,300		
D. Tract 4 (39.22 Acres - Darlington)	Land	$ 34,400	B.W. Anderson	Hulsart
	Imp.	4,200		Dargan
	Timber	30,000		
		$ 68,600		
E. Tract 5 (196.5 Acres - Darlington)	Land	$107,700	B.W. Anderson	Hulsart
	Imp.	3,000		Dargan
	Timber	65,000		
		$175,700		
F. Tract 6 (85 Acres -	Land	$ 21,300	B.W. Anderson	Hulsart
	Timber	60,000		Dargan
		$ 81,300		
G. Independent Value of Tobacco Allotment		$ 41,100	B.W. Anderson	Hulsart
H. Family Home		$ 49,700	B.W. Anderson/ J.E. Anderson	Shortt
I. Lakeside Lot		$ 13,000	B.W. Anderson/ J.E. Anderson	Shortt

TOTAL VALUE OF REAL ESTATE: $624,500

App. 1

SCHEDULE B

CASH

As of May 1, 1979		*Then in name of:*
A. Pee Dee State Bank		B.W. Anderson or
CD #2689		Mary Dana Anderson
Open on 1/7/77	$15,210.16	
Value as of 5/1/79	$15,663.17	
w/interest accrued	$ 453.00	
B. Security Savings & Loan		B.W. Anderson or
CD #72888-7		Nancy R. Anderson
Open. Bal. 10/18/76	$10,000.00	
Interest Accrued	2,249.51	
Value 5/1/79	$12,149.51	
C. Security Savings & Loan		B.W. Anderson or
CD #72885-3		Mary Dana Anderson
Open. Bal. 10/14/76	$15,000.00	
Interest Accrued	3,239.83	
Value 5/1/79	$18,239.83	
D. South Carolina National		Mr. or Mrs.
CD #505721		B.W. Anderson
Open. Bal. 1/20/76	$11,000.00	
Interest Accrued	2,466.00	
Value 5/1/79	$13,466.00	
E. South Carolina National		B.W. Anderson or
Savings #716456892		Joanne E. Anderson
Value as of 5/1/79	$15,598.29	
F. Marlboro Savings & Loan		B.W. Anderson
Savings #6492-6		
Value as of 5/1/79	$ 5.00	
G. Treasury Bond from		B.W. Anderson or
South Carolina National		Joanne E. Anderson
#716456892		
Withdrawal 11/9/78	$28,600.00	
Value 5/1/79	30,000.00	
H. Peoples Federal S & L		B.W. Anderson or
CD #307067-2		Nancy R. Anderson
Open. Bal.	$10,000.00	
Interest Accrued	326.67	
Value 5/1/79	$10,326.67	
I. South Carolina National		Mr. or Mrs.
Checking #711 019 174		B.W. Anderson
Value as of 5/1/79	$ 492.50	
J. South Carolina National		B.W. Anderson
Checking #711 082 941		
Value as of 5/1/79	$ 1,787.35	
K. Mutual Savings & Loan		B.W. Anderson or
CD #130043-7		Dana Anderson
Open. Bal. 1/5/79	$10,000.00	
Interest Accrued	326.67	
Value 5/1/79	$10,326.67	

L. Pee Dee State Bank — B.W. Anderson
Checking #301 093 7
Value as of 5/1/79 ..... $ 1,079.46
TOTAL VALUE OF CD's AND BANK ACCOUNTS: $129,134.45

App. 2

SCHEDULE C

RETIREMENT PLANS

Retirement Plans			
A. USDA	$135,758	B.W. Anderson Travis Pritchett	
B. Equitable Life Assurance	$ 15,920	J.E. Anderson Travis Pritchett	

TOTAL VALUE OF RETIREMENT PLANS: $151,678

SCHEDULE D

CASH VALUE OF INSURANCE

Insurance Policies			
A. Pilot Life	$1,890.00	B.W. Anderson	Policy in Evidence
B. Life Ins. of Georgia	$ 950.00	B.W. Anderson	Policy in Evidence
C. Jefferson Standard	$ 589.59	B.W. Anderson	Policy in Evidence
D. Southern	$3,225.00	B.W. Anderson	Policy in Evidence

TOTAL CASH VALUE OF INSURANCE POLICIES: $6,534.19

SCHEDULE E

MISCELLANEOUS

Household Goods			
A. Furniture (furnishings and everyday china)	$3,614.00	J.E. Anderson	John H. Davis Appraisal
B. China and Crystal	$1,500.00	J.E. Anderson	
C. Silver	$2,228.10	J.E. Anderson	Belks

TOTAL VALUE OF HOUSEHOLD GOODS: $7,342.10

Farm Equipment			
A. Depreciated Value of Farm Equipment	$ 36,490	B.W. Anderson	1979 Tax Return (P. 1 & 2 Form 4562)

TOTAL VALUE OF FARM EQUIPMENT: $36,490
TOTAL VALUE OF MISCELLANEOUS: $43,832.10

TOTAL VALUE OF ALL ASSETS	$956,676.53
Held by Mr. Anderson	$902,064.43
Held by Mrs. Anderson	$ 54,612.10

App. 3

EXCLUSIONS FROM MARITAL PROPERTY

SCHEDULE F

ASSETS AT THE TIME OF MARRIAGE

Owned by B. W. Anderson		*Value*
A.	Post Office Account	$ 2,000.00
B.	Peoples Federal	$ 1,381.58
C.	Citizens Bank of Darlington	$ 6,423.67
	Total	$ 9,805.25

GIFTS TO MR. ANDERSON
FROM MR. OR MRS. EARL C. ANDERSON

	Asset	*Value*	*Source of Value*
A.	Cash - 1964	$ 1,600.00	Check in Evidence
B.	Cash - Dec., 1965	$ 13,353.00	Check in Evidence
C.	Jordan Farm - Dec., 1965	$ 6,000.00	Appraisal in Evidence
D.	Charles Farm - Dec., 1965	$ 9,000.00	Appraisal in Evidence
	TOTAL	$ 29,853.00	

BEQUESTS TO MR. ANDERSON

A.	93-Acre Tract with Timber in Darlington	$ 35,000.00	Estate Appraisal Mr. Parrish
B.	196-Acre Tract with 4 Buildings and Timber	$ 71,300.00	Estate Appraisal Mr. Parrish
C.	½ Interest in 72 Acres in Florence (½ x $31,800)	$ 20,250.00	Estate Appraisal Mr. Parrish
	TOTAL	$126,550.00	

MISCELLANEOUS

A.	Cash Gift from Mrs. Lucille Anderson on 9/13/78 (1)	$ 5,881.63
B.	Gift from Mr. & Mrs. Earl C. Anderson to Mary Dana's Educational Fund (2) Pee Dee State Bank - 1/7/77	15,210.16

C. Gift from Mr. & Mrs. Earl C. Anderson to Patricia Anderson on 2/22/73 (2)	1,470.00	
	$ 22,561.79	
D. Increase in Real Estate values due to inflation	163,748.50	
TOTAL VALUE OF ALL OF ABOVE		$352,618.50
LESS: Estate Tax paid 5/14/79 (Check in evidence)		20,408.20
NET EXCLUSION		$332,210.30

App. 4

APPENDIX E

NOVEMBER 12, 1981 TESTIMONY OF EUGENE F. ROGERS (RELEVANT PORTIONS)

Q. (by Mr. Warner) On March 27th, the day that the pre-trial or the oral argument was cancelled, you and Mr. Easterling had a conference with the Judge in Dillon?

A. (by Mr. Rogers) No, sir, that's not correct. That was the — I had a conference in Columbia back a week or so previously and the Judge had asked me some questions relating to comments in the Brief that's eight hours. I had planned to be in Bennettsville to discuss with Mr. Easterling the outstanding costs that we had, how to collect our fees, where we then were, what to do about paying witnesses who were not paid, how to handle various things and at the conclusion of that, I dropped by the Judge's office for a few minutes to answer — in response to his request that I answer some questions.

Q. (by Mr. Warner) Did you go to Dillon?

A. (by Mr. Rogers) Yes, sir, I went to Dillon. Mr. Easterling — I left here after lunch.

Q. (by Mr. Warner) And you went to Dillon for the purpose of meeting the Court or meeting with the Judge?

A. (by Mr. Rogers) No, sir. I went to Dillon in response to the Judge's request that I provide him with some information.

Q. (by Mr. Warner) About this case?

A. (by Mr. Rogers) It was to discuss, to answer his questions about this case, yes, sir.

Q. (by Mr. Warner) Mr. Rogers, when you submitted, I see you have eight hours down there. When you submitted the one to us yesterday, you show 9.5 hours for conference —

A. (by Mr. Rogers) Yes, sir. I don't know how that came about but my time sheet shows — my time slip shows 8 hours and there a lot of other corrections on there. I sent that to you and said that is subject to a review.

APPENDIX F

R. HARRY EASTERLING'S ORIGINAL TIME ITEMIZATION (RELEVANT PORTION)

3/27/81 Conference with Judge Gasque and Atty. Rogers; travel to Dillon 5.50

APPENDIX G

R. HARRY EASTERLING'S REVISED TIME ITEMIZATION (RELEVANT PORTION)

3/27/81 Conference with Atty. Rogers 3.00

APPENDIX H

NOVEMBER 12, 1981 TESTIMONY OF R. HARRY EASTERLING (RELEVANT PORTION)

Q. (by Mr. Warner) Mr. Easterling, this itemization in your record the Exhibit that's in evidence reflects on March 27th, 1981, you had a conference with Attorney Rogers for three hours, correct?

A. (by Mr. Easterling) That is correct.

Q. (by Mr. Warner) Was that the day you went to Dillon?

A. (by Mr. Easterling) No, sir. I said the entry for an expense of a trip for Dillon should have been removed and was not removed.

Q. (by Mr. Warner) Why should it have been removed?

A. (by Mr. Easterling) Because I didn't go.

Q. (by Mr. Warner) On Exhibit 2, this reflects the March 27th , 1981, conference with Judge Gasque and Attorney Rogers travel to Dillon five and a half hours. What is

the difference and why was that modified to three hours and the trip to Dillon left out?

A. (by Mr. Easterling) The bill as prepared and as initially reviewed by me reflected my involvement on that day in the manner that the bill stated by reviewing the bill as I prepared testimony in this case, I became aware that the entry was incorrect. I went through the bill and through my file and I instructed my secretary to prepare the corrective sheet which was forwarded to you and which accurately reflects the activity that I had on that day. Through an oversight, I did not have the secretary remove the $9.62 charge or whatever for the trip to Dillon.

Q. (by Mr. Warner) Was that $9.62 charge was that paid to you, the $9.62.

A. (by Mr. Easterling) No sir.

Q. (by Mr. Warner) On the 27th of March, did you meet with Mr. Rogers here in Bennettsville?

A. (by Mr. Easterling) Yes, sir. There was a meeting between Mr. Rogers and me. I believe that was the date first scheduled for oral argument in the case and Mr. Rogers came to my office and we discussed the case fully. I think he arrived early, we had discussions and it continued fairly late and we had lunch together at Herb's Restaurant.

Q. (by Mr. Warner) Well, you did not go to Dillon with Mr. Rogers on the 27th?

A. (by Mr. Easterling) There had been discussion of my going to Dillon but I did not go to Dillon.

Q. (by Mr. Warner) You did not go to Dillon. Well would you tell me, please, sir, where the information came on Exhibit 2 that there was a conference with the Judge and Mr. Rogers and travel to Dillon. Where did that information come from?

A. (by Mr. Easterling) You mean on my initial bill?

Q. (by Mr. Warner) Yes, sir.

A. (by Mr. Easterling) It came from my handwriting. I prepared a handwritten bill which my secretary typed as I recall.

Q. (by Mr. Warner) Well, Mr. Easterling, if you prepared it, why was the change from you going to you not going?

THE COURT: Hasn't he answered that question for you two or three times?

MR. WARNER: Judge, I didn't understand it.

THE COURT: Well, he said that was a mistake and that he ordered it to be removed and it was removed and when it wasn't removed in the other. It seems to me like we've gone over that two or three times. That's my recollection of his testimony.

Q. (by Mr. Warner) Mr. Easterling, then you did not go with Mr. Rogers to Dillon?

A. (by Mr. Easterling) That is correct. I did not go. There was a discussion about my possibly going —

Q. (by Mr. Warner) A discussion between who and who?

A. (by Mr. Easterling) Between Mr. Rogers and me about my possibly going to Dillon.

Q. (by Mr. Warner) What was the purpose of going to Dillon?

THE COURT: He said he didn't go to Dillon, Mr. Warner.

MR. WARNER: Judge —

THE COURT: Wait a minute now. He's answered that question about three times. I think we've covered that thoroughly, haven't we?

MR. WARNER: Judge, I hadn't asked him what the purpose of the conference —

THE COURT: He said it was a mistake, that he asked his secretary to remove it. Could it be any plainer that that? It seems to me that he said that was an error, that he corrected it, and he didn't go to Dillon, that the conference was with Mr. Rogers about going to Dillon.

MR. WARNER: Yes, sir —

THE COURT: It seems to me like we're just spinning our wheels.

MR. WARNER: Judge, the only thing I'm asking this witness is what was the conversation between him and Mr. Rogers about him going or not going to Dillon.

A. (by Mr. Easterling) It's my recollection and that's entirely what it is, my recollection is Mr. Rogers was going to have some discussion with the Judge in Dillon. That the Judge was available inasmuch as he'd scheduled today for oral argument and Mr. Rogers had full discussion with me on the morning and there was no apparent need for me to go to Dillon. My recollection is that the discussion may have re-

lated to a matter other than this case. Again, I was not thereafter scheduled to go to Dillon and did not go.

Q. (by Mr. Warner) So, you do not know the purpose of the trip to Dillon?

THE COURT: Mr. Warner, he's answered that question. Go on to something else

A. (by Mr. Easterling) I think that it would be more appropriate for the party who went to Dillon to discuss what went on there. It would be speculation on my part.

THE COURT: You've answered that question.

APPENDIX I

EUGENE F. ROGERS' ORIGINAL TIME ITEMIZATION (RELEVANT PORTION)

3/27/81	Conference with Harry Easterling and Judge Gasque; trip to Bennettsville and Dillon	9.5

APPENDIX J

EUGENE F. ROGERS' REVISED TIME ITEMIZATION (RELEVANT PORTION)

Conference with Harry Easterling and Judge Gasque; trip to Bennettsville and Dillon	8.0

APPENDIX K

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM MARLBORO COUNTY
THE HONORABLE S. NORWOOD GASQUE,
CHIEF JUDGE
FAMILY COURT FOR THE FOURTH JUDICIAL CIRCUIT
DOCKET NO. 79-DR-38-166

Joanne E. Anderson, Respondent-Appellant,
vs.
Bunyan W. Anderson, Appellant-Respondent.

APPELLANT-RESPONDENT'S MOTION FOR A NEW TRIAL

Appellant-Respondent Bunyan W. Anderson, hereinafter "Husband", alleges:

1. That Respondent-Appellant Joanne E. Anderson, hereinafter "Wife", instituted this action against him by Petition filed with the Clerk of Court for Marlboro County, South Carolina, on May 21, 1979, through which she sought a divorce on the grounds of physical cruelty, custody of the parties' minor children, alimony, child support, equitable division, attorney's fees and other related matrimonial relief.

2. That he timely served and filed an Answer thereto dated June 13, 1979, which denied the material allegations of the Petition and requested certain affirmative relief.

3. That the Wife thereafter filed a second Petition dated June 18, 1979, wherein she sought *pendente lite* support for herself and the parties' minor children, together with certain other *pendente lite* relief.

4. That on June 22, 1979, the parties entered into a *pendente lite* Agreement which was ratified by Order of the Family Court for the Fourth Judicial Circuit dated June 22, 1979.

5. That the Wife subsequently filed a third Petition, dated November 7, 1979, wherein she sought additional *pendente lite* relief.

6. That a hearing on the November 7, 1979 Petition was conducted on November 15, 1979, and on November 29, 1979, the Family Court for the Fourth Judicial Circuit issued, by stipulation and without prejudice to the parties, a second *pendente lite* Order under which the parties operated until the issuance of a final Order on May 18, 1981 which is the subject of appeal before this Court. (The November 29, 1979 Order is attached hereto as Exhibit "A")

7. That yet a third *pendente lite* Order was issued on December 13, 1979, which required the Husband to pay the Wife's attorneys Two Thousand and 00/100 ($2,000.00) Dollars in *pendente lite* suit money, in addition to certain other filing fees, service fees, telephone calls, and other out-of-pocket expenses.

8. That on April 4, 1980, the Wife filed and served an Amended Petition.

9. That on April 11, 1980, the Husband filed and served an Answer to the Amended Petition, Requests for Affirmative Relief, and Counterclaim.

10. That depositions of the Husband and Wife were subsequently taken by agreement between the parties' respective counsel.

11. That by Order dated October 21, 1980, pursuant to the Wife's motion for contempt, additional suit money and attorney's fees, and other relief, the Husband was required to pay, among other things, an additional Four Thousand Thirty and 00/100 ($4,030.00) Dollars to finance the cost to the Wife of obtaining experts to assist in the preparation of her case on the merits which had been scheduled previously for October 28, 1980 and October 29, 1980. The Husband appealed this Order.

12. That the first hearings on the merits of this action were conducted on October 28, 1980 and October 29, 1980.

13. That by Notice of Motion and Motion dated November 10, 1980, in the midst of the merits hearings, the Wife's attorneys sought further discovery and filed certain Requests for Admissions.

14. That on November 19, 1980, the Wife was granted certain additional discovery, and the Husband was required to assist the Wife's appraisers in locating certain real estate. The Husband appealed this Order.

15. That further hearings on the merits in this action were conducted on December 2, 3, 4, 5, 22 and 23, 1980 and February 12, 13 and 20, 1981. A total of eleven (11) days of testimony was taken on the merits, in addition to other hearings.

16. That thereafter the Family Court for the Fourth Judicial Circuit directed counsel for both parties to file with the Court and exchange Briefs on the merits of this action.

17. That on or about March 5, 1981, counsel for the Wife filed the Wife's Brief with the Court and served the same on the Husband's counsel.

18. That on or about March 20, 1981, counsel for the Husband filed the Husband's Brief with the Court and served the same on the Wife's counsel.

19. That on or about March 27, 1981, counsel for the Wife filed with the Court the Wife's Reply brief and served the same on the Husband's counsel.

20. That various discussions were had, and correspondence was exchanged between the Court and counsel for the respective parties as to whether or not oral argument on the issues of this case would take place. A summary of the relevant discussions and correspondence follows:

a. That by letter dated February 24, 1981, counsel for the Wife wrote to the Court, with a copy to counsel for the Husband, suggesting that oral argument be conducted in Bennettsville on Friday, March 27, 1981.

b. That by letter dated March 5, 1981, counsel for the Wife wrote to the Court, with a copy to counsel for the Husband, transmitting a copy of his Brief on behalf of the Wife, again mentioning the schedule for oral argument at Bennettsville on the morning of Friday, March 27, 1981.

c. That by letter dated March 10, 1981, the Court wrote to counsel for the Wife, with a copy to counsel for the Husband, confirming that the oral argument was scheduled for Friday, March 27, 1981 at Bennettsville, South Carolina, stating that "If for any reason you decide not to have it, please let me hear from you so I can utilize the time for other matters."

d. That by letter dated March 12, 1981, counsel for the Husband wrote to the Court, with a copy to the counsel for the Wife, advising the Court that he saw no useful purpose for spending additonal time for oral argument and asking that the same be cancelled.

e. That by letter dated March 16, 1981, the Court wrote to counsel for the Husband, with a copy to counsel for the Wife, requesting to hear from counsel for the Wife as to whether he desired oral argument. The Court requested immediate notification and indicated that the time previously set aside for oral argument could be utilized otherwise.

f. That by letter dated March 17, 1981, counsel for the Wife wrote to the Court, with a copy to counsel for the Husband, advising of his desire to cancel oral argument and withdrawing his request therefore. (Exhibit "B").

g. That by letter dated March 18, 1981, the Court wrote to the Clerk of Court for Marlboro County, South Carolina, with copies to both counsel for the Husband and counsel for the Wife, requesting that the Clerk strike the time previously set aside for oral argument on March 27, 1981 at 9:30 a.m. at Bennettsville, and fill that time slot "with something else as the attorney's involved are cancelling the oral arguments. . .'. (Exhibit "C").

h. That on March 23, 1981, counsel for the Husband spoke with counsel for the Wife by telephone, and again agreed that oral argument would be cancelled. This agreement and conversation was confirmed by letter dated March 23, 1981 from counsel for the Husband to the Court, with a copy to counsel for the Wife, so that the oral argument was cancelled and that counsel for neither party would appear at that time (Exhibit "D").

i. That this agreement and conversation was further confirmed by a March 24, 1981 letter of counsel for the Wife to the Court, with a copy to counsel for the Husband, again stating that the parties' respective counsel had "agreed at that time to cancel the oral argument." (Exhibit "E").

21. As a result of the foregoing, counsel for the Husband herein did not appear on March 27, 1981 at Bennettsville.

22. That, however, notwithstanding the explicit agreement with the Court which cancelled oral argument, the explicit agreement between counsel for the respective parties to cancel oral argument, and the fact that the Court had cancelled the oral argument which had been scheduled for Friday, March 27, 1981 with the Clerk of Court, and nothwithstanding the cancellation of the same and the Clerk of Court substituting other cases in that time slot, Eugene F. Rogers, who is one of the attorneys representing the Wife, and R. Harring Easterling, who is the other attorney representing the Wife, according to the Husband's information and belief, met with The Honorable S. Norwood Gasque, Chief Judge, on Friday, March 27, 1981, off the record and *ex parte*, without notice to the Husband or his counsel, at Bennettsville, South Carolina and at Dillon, South Carolina, for an unknown period of time, but between three (3) and nine and one-half (9½) hours, for the explicit and express purpose of discussing the merits of the pending decision in this case which was ultimately issued by Judge Gasque on May 18, 1981. At the time of this meeting, all evidence was in and briefs had been submitted, but no decision had been rendered.

23. That on May 18, 1918, the Family Court for the Fourth Judicial Circuit, per The Honorable S. Norwood Gasque, Chief Judge, issued its final Order. (Exhibit "F").

24. That such Order contains a highly unfavorable result to the Husband including, but not limited to, the taking the Husband's net worth, as valued by the Court at Nine Hundred Thousand and 00/100 ($900,000.00) Dollars, and reducing his allocated share, after payments to the Wife, State and Federal income taxes, and litigation expenses, to approximately thirteen (13) per cent of what the Court found

to be the marital estate. (See attached Affidavit and charts of Elizabeth Bryan, Certified Public Accountant. (Exhibit "G").

25. That the first indication, of any manner whatsoever, received by counsel for the Husband that the trial Judge and two (2) attorneys representing the Wife had possibly met at Bennettsville and Dillon, South Carolina, for an unknown period of time, exceeding three (3) hours, on Friday, March 27, 1981, for the express purpose of discussing the merits of the instant action, came when counsel for the Husband received from R. Harry Easterling, one of the attorneys representing the Wife, in his June 1981, time itemization and expense records which were turned over to counsel for the Husband in the course of preparation for litigation on the issues of attorney's fees which was ultimately litigated on November 12, 1981. Thereafter, on separate occasions, the balance of Mr. Easterlings' itemizations were received, the last of which was received on November 12, 1981. These itemizations of Mr. Easterling reflect:

a. In his original time itemization dated June 4, 1981, Mr. Easterling states on page 5: "3/27/81 Conference with Judge Gasque and Attorney Rogers; travel to Dillon 5.5 (hours)" (Exhibit "H").

b. In his original expense itemization, page 6, Mr. Easterling states: "One trip to Dillon and return 52 miles at $0.185 per mile $9.62" (Exhibit "I").

c. On November 11, 1981, at approximately 5:00 p.m., the Husband's counsel was served with a document entitled "Exhibits for Attorneys Fees and Costs" as prepared by Mr. Rogers and Mr. Easterling for presentation to the Court on November 12, 1981. This document was received in evidence on November 12, 1981. On page 61 thereof, Mr. Easterling states: "3/27/81 Conference with Attorney Rogers 3.00 (hours)" (Exhibit "J").

d. Further, in this Exhibit, at page 62, the expense statement of Mr. Easterling concerning the trip to Dillon and return, as indicated above, remained the same. There was no other record of a trip to Dillon in Mr. Easterling's time records which the Husband can locate. (Exhibit "K").

26. That Mr. Rogers' time and expense records were provided to the Husband's counsel in October 1981 with the understanding that they were subject to review and refinement. Mr. Rogers' original itemization reflected:

a. "3/27/81 Conference with Harry Easterling and Judge Gasque; trip to Bennettsville and Dillon 9.5 (hours)" (Exhibit "L").

27. That the "Exhibit for Attorney's Fees and Costs" which was delivered to the Husband's counsel on November 11, 1981, and which was introduced into evidence on November 12, 1981, included the following at page 31:

a. "3/27/81 Conference with Harry Easterling and Judge Gasque; trip to Bennettsville and Dillon 8.0 (hours)" (Exhibit "M").

28. That on November 12, 1981, while counsel for the Husband was litigating the matter of attorney's fees in Bennettsville, South Carolina, his office received a November 10, 1981 correspondence from Mr. Easterling, together with two (2) pages of attachments, which reflect a 2½ hour reduction upon his page 5. (Exhibit "N").

29. That upon reviewing these contradictory itemizations, counsel for the Husband, on his arrival in Bennettsville, South Carolina on November 12, 1981, determined from the Clerk of Court that the oral argument of March 27, 1981, had, in fact, been cancelled, and that other cases had been scheduled between 9:30 a.m. on Friday March 27, 1981 before Judge Gasque through 11:15 a.m. (The Schedules of the Family Court of Marlboro County for the week including March 27, 1981 is attached as Exhibit "O").

30. That at the attorney's fee hearing on Thursday November 12, 1981, where the Wife was requesting in excess of One Hundred Fourteen Thousand and 00/100 ($114,000.00) Dollars in fees and costs, both R. Harry Easterling and Eugene F. Rogers, counsel for the Wife, testified under oath. According to the recollection of the Husband, each testified as set forth hereinafter on cross-examination concerning this meeting on March 27, 1981:

a. *Mr. Eugene F. Rogers:* Mr. Rogers admitted that the oral argument had been cancelled. Mr. Rogers admitted he had gone to Bennettsville, South Carolina to see Mr. Easterling. Mr. Rogers admitted he had stopped by the Marlboro County Court House, Bennettsville and had spoken with Judge Gasque. Mr. Rogers admitted that the Judge had asked him certain questions about his client's brief in this case. Mr. Rogers admitted he and Harry Easterling drove from Bennettsville, South Carolina to Dillon, South Carolina to discuss this case with Judge Gasque.

b. *R. Harry Easterling:* Mr. Easterling testified how his time records were kept, and such were accurate. When questioned about the discrepancy between his original March 27, 1981 time entry and his subsequent March 27, 1981 time entry, Mr. Easterling stated that the original entry was in error. He stated that he did not go to Dillon, South Carolina and that he did not speak with the Judge. Mr. Easterling stated that he and Mr. Rogers discussed Mr. Rogers going to Dillon, South Carolina on March 27, 1981, but he felt that Mr. Rogers was going to speak with Judge Gasque about another case, not "*Anderson v. Anderson*". Mr. Easterling stated that the expense for the Dillon trip was also in error, and should not have been in the final draft of his itemization of expenses.

31. That the transcript of that hearing, which has been ordered by the Husband, will most accurately reflect the exact testimony of Mr. Rogers, Mr. Easterling, and the comments of Judge Gasque concerning the same.

32. That the communications and personal meeting between the trial Judge and counsel for the Wife, admittedly, were *ex parte* and without notice to counsel for the Husband; that the meeting and communications between the trial Judge and counsel for the Wife was for an unknown period of time, but probably in excess of three (3) hours in accordance with the Wife's counsels' time sheets; and, that the meeting was for the express purpose of discussing the merits of this action.

33. That the Husband is informed and believes that the fact that the trial Judge, who sat as both Judge and jury in this case, and counsel for the Wife met, for extensive discussions on the merits of the pending case, without notice to him or his counsel, without invitation to him or his counsel, *ex parte*, and off the record on March 27, 1981, has resulted in a gross denial of the right of the Husband to a fair and impartial trial, as well as the denial of due process and equal protection under the provisions of both the Fifth and Fourteenth Amendments of the United States Counstituion, as well as under the due process and equal protection provisions of the South Carolina provisions.

34. That the Husband is further informed and believes that the *ex parte* off the record meeting, without notice or invitation to him or his attorney, which took place between the trial Judge and counsel for the Wife on March 27, 1981 at Dillon, South Carolina and Bennettsville, South Carolina has resulted in a substantial deprivation of his property rights, assets, and income.

35. That the Husband is further informed and believes that the conduct of the Wife's counsel and the trial Judge in participating in said *ex parte* and off the record meeting, without notice or invitation to the Husband or his attorney, is sufficiently prejudical and improper as to require this Court to declare null and void the May 18, 1981 Order and require a new trial.

36. That the Husband is informed and believes that based upon the foregoing substantial deprivation of his right to due process of law and equal protection of law, he should be granted a new trial *de novo* on all issues. The May 18, 1981 Order issued by the trial Court should be declared nulla nd void,s except to the extent that the same granted the Husband and Wife a divorce upon the grounds of one (1) year separation, as such ruling did not require any exercise of discretion on the part of the trial Judge, and the facts giving rise to said grounds to divorce were admitted by all parties.

37. That the Transcript of Record in this case contains approximately eighteen hundred and one (1801) pages of testimony; that there will, according to Husband's information and belief, be several hundred additional pages to be

printed. That the Husband has just moved to settle the record based upon the Wife's objections to his proposed Case and Exceptions. That the Husband is informed and believes that the transcript before this Court will contain over two thousand (2000) pages, and that the cost for the transcript alone, will be $0.165 per page for 25 volumes, with the cost of said Transcript of Record to be in excess of Eight Thousand Two Hundred Fifty and 00/100 ($8,250.00) Dollars, excluding cost of attorney's time, printing briefs, and the like.

38. That the Husband is informed and believes that this appeal will take two (2) to three (3) years to reach this Court for a hearing on the merits.

39. That the record on appeal will not disclose any further facts as to the *ex parte* and off the record meeting between the trial Judge and the Wife's counsel, on March 27, 1981, and if the May 18, 1981 Order is vacated and the parties return to the *pendente lite* Order of November 29, 1979, the basis of the balance of the appeal will be moot; that the Husband has taken appeals from certain other Orders of the trial Judge granting discovery and suit money in the midst of proceedings, which will also be moot. That the Husband should not be required to proceed with the expense of this appeal due to the inherent and obvious defect which will not appear in the record of the Lower Court proceedings.

40. On account of the foregoing, the Husband does not feel or believe that he can receive a fair and impartial trial before Judge Gasque, Chief Judge of the Family Court for the Fourth Judicial Circuit; that as Judge Gasque is the Chief Judge for this Circuit, the Husband is informed and believes that he will not be able to secure a fair and impartial trial in the Fourth Judicial Circuit, and requests, therefore, that this Court authorize, in its Order for a new trial, a transfer of this action to an adjoining Circuit for a trial *de novo.*

41. That the Husband has paid to Wife's counsel as suit money in excess of Six Thousand and 00/100 ($6,000.00) Dollars; that the Husband, in the preparation of this case, has spent substantial sums for attorney's fees, expert witness fees, and costs; that due to the foregoing, in its Order for a new trial, this Court should assess sanctions against the Wife's counsel and require:

a. That the Husband be reimbursed for the total sums paid to the Wife and/or her counsel as fees and suit money during these proceedings as required by the lower Court.
b. That the Wife's counsel be assessed with all taxable costs associated with this appeal.

42. That the May 18, 1981 Order is extremely oppressive to the Husband; that based upon the facts and circumstances as evolved on November 12, 1981, the Husband is entitled to a new trial in another Circuit, reimbursement of suit money and attorney's fees, a return to the *pendente lite* Order pending retrial of this cause, together with all other relief requested hereinabove, and any other relief the Court may deem fit, proper, and equitable. The Husband's Affidavit is attached hereto and made a part hereof.

WHEREFORE, THE Husband prays that this Court consider the foregoing and grant him the following relief:

1. An Order vacating the May 18, 1981 Order of the Honorable S. Norwood Gasque, except to the extent that the same granted the parties a divorce on the grounds of one year's separation.
2. An Order granting a new trial, *de novo*, on the merits of all issues, save and except the issue of divorce.
3. An Order staying all proceedings in the Lower Court on the issue of attorney's fees.
4. An Order barring Judge Gasque from issuing any further Orders in this matter or participating in any further proceedings in this matter.
5. An Order transferring this cause from the Fourth Judicial Circuit to an adjoining Circuit for a trial *de novo*.
6. An Order reinstating the November 29, 1979 *pendente lite* Order pending a new trial.
7. An Order requiring the wife's counsel to reimburse the Husband for all attorney's fees, costs, suit money, and expenses heretofore advanced to them by the Husband per the Lower Court's Orders.
8. An Order assessing the taxable costs of this appeal against the Wife's counsel.

9. An Order granting the Husband such other and further relief as this Court may deem just, proper, and equitable.

s/JAN L. WARNER
C. DIXON LEE, III
Attorneys for Respondent

Sumter, South Carolina
November 13, 1981

Opposition

Office - Supreme Court, U.S.
FILED
MAY 13 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81- 1873

In the Supreme Court of the United States

OCTOBER TERM, 1981

BUNYAN W. ANDERSON, PETITIONER,

versus

JOANNE E. ANDERSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

EUGENE F. ROGERS
Post Office Box 58
Columbia, South
29202
(803) 799-9900
Attorney of Record,

HARRY R. EASTERLING
Post Office Box 655
Bennettsville,
South Carolina 29512
(803) 479-2878

QUESTIONS PRESENTED

1. Whether the January 7, 1982, opinion of the South Carolina Supreme Court, which Petitioner seeks to have this Court review on certiorari, is a final judgment or decree as is required by 28 U.S.C. §1257.

2. Whether there exists an adequate and independent State ground justifying the decision of the South Carolina Supreme Court to deny Petitioner's Motions, so that this Court is not properly presented with a Federal question for review.

3. Whether Petitioner's Federal claim is frivolous and without merit, therefore failing to invoke the Court's limited jurisdiction over State domestic matters.

4. Assuming, without admitting, that the Court reaches the substantive question does a conference held by a Family Court Judge in a divorce case with one of the lawyers after the Judge has made a decision in the case for the purpose of giving the lawyer instructions for the preparation of an Order constitute a denial of Petitioner's right to due process of law under the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS PAGE

Questions Presented i

Table of Authorities 3

Opinions Below 6

Jurisdiction 6

Statement 7

Arguments 11

Conclusion 19

Appendix ..... A-i

TABLE OF AUTHORITIES PAGE

Baker v. Cutting, 280 N.W. 548 (Iowa 1938) 16
In re Burrus, 136 U.S. 586 (1890) 13
California Water Service Company v. Redding, 304 U.S. 252 (1938) 14
Carpenter v. State, 575 P.2d. 26 (Kansas 1978) 18
Costarelli v. Massachusetts, 421 U.S. 193 (1975) 11
Fairbanks Builders, Inc. v. Morton De Lima, Inc. 483 P.2d. 194 (Alaska 1971) 17
Globe Drilling Co. v. Cramer, 562 P.2d 762 (1977) 15
Gorman v. Washington University, 316 U.S. 98 (1942) 12
Hayden v. Hayden, 28 N.Y.S. 2d 679 (1967) 15
Herb v. Pitcairn, 324 U.S. 117 (1945) 13
Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 13
Jefferson v. City of Anchorage, 513 P.2d 1099 (Alaska 1973) .. 15
Kamuchey v. Trzesniewski, 98 N.W.2d 403 (Wisconsin 1959) .. 16
Market St. R. Co. v. Railroad Commission, 324 U.S. 548 (1945) 11
McCarty v. McCarty, ____U.S. ____, 101 S.Ct. 2728 (1981) 13
North Dakota Board of Pharmacy v. Snyders Drug Stores, Inc. 414 U.S. 156 (1973) 11
Ohio ex rel Popovici v. Agler, 280 U.S. 379 (1930) 13
Pacific States Case Iron Pipe Co. v. Roberts, 489 P.2d. 336 (Colo. App. 1971) 16
Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 12
Ridgway v. Ridgway, ____U.S. ____, 102 S.Ct. 49 (1981) .. 13
Schoenberg v. Benner, 251 Cal. App. 2d 154, 59 Cal. Rptr. 359 (1967) 15

PAGE

South Side Lumber Co. v. Stone Construction Co., 152 S.E. 2d 721 (W. Va. 1967) 15
St. Louis & S.F.R. Co. v. Shepherd, 240 U.S. 240(1915) 14
Stratton v. Stratton, 239 U.S. 55 (1915) 12
United States v. Brierley, 315 F.Supp. 1392 (W.D. Pa. 1970). 18
Valley S.S. Co. v. Wattawa, 244 U.S. 202 (1916) 14
Wyoming Farm Bureau Mutual Insurance Co. v. May, 434 P.2d. 507 (Wyo. 1967) 15

STATUTES

28 U.S.C. §1257 11

MISCELLANEOUS

Rule 24, Rules of Practice of the Supreme Court of South Carolina 8
76 Am Jur. 2d 16
54 A.L.R. 3d. 868 16,17
Canon 3A, Code of Judicial Conduct 17,18

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1873

BUNYAN W. ANDERSON, PETITIONER,

versus

JOANNE E. ANDERSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Joanne E. Anderson, respectfully submits that no justifiable ground exists for the issuance of a Writ of Certiorari to review the decision of January 7, 1982 of the Supreme Court of South Carolina and requests that the Petition be denied.

OPINIONS BELOW

The unreported decisions of the South Carolina Supreme Court handed down on January 7, 1982, and February 2, 1982, holding that various Motions filed by Petitioner and the subject of this Petition were without merit are reproduced herein as Appendix E and F.

JURISDICTION

Petitioner has attempted to invoke jurisdiction pursuant to 28 U.S.C. §1257(3). Respondent opposes the invocation of jurisdiction on the ground that the January 7, 1982, opinion of the South Carolina Supreme Court is not a final judgment or decree as is required by 28 U.S.C. §1257 and opposes the Petition on further grounds hereinafter presented.

Respondent further maintains that there exists an adequate and independent State ground upon which the South Carolina Supreme Court grounded its determination, so that this Court is not properly presented with a Federal question for review.

STATEMENT

On May 16, 1979, Mrs. Joanne E. Anderson filed her action in the Family Court of the Fourth Judicial Circuit of South Carolina for a divorce from her husband, Bunyan W. Anderson, and for other relief generally associated with divorce cases. The case was vigorously and aggressively contested on all issues. By Order dated May 18, 1981, the Court handed down its judgment.The Order is contained in Appendix D of Petitioner's Brief. Both parties were unhappy with aspects of the case and both appealed to the South Carolina Supreme Court. The husband's notice of appeal is in the Appendix I. He also appealed from the Order settling the record of the case and that is in Appendix J.

All aspects of this case are very much alive in the courts of South Carolina. The husband has five (5) appeals underway to the Supreme Court of South Carolina. They are contained in the Appendix as G, H, I, J, and K. The most recent appeal is from an Order setting attorneys fees and costs, Appendix M. A review by the Court of this Order and the Order of May 18, 1981 will speak eloquently to the Court of the litigious nature of the husband. There is no finality to any aspect of the case from the South Carolina Courts. There is no final judgment.

One of the issues reserved to the Court in its May 18 Order related to setting reasonable attorney's fees and court costs for the wife. In documents forwarded to the husband's attorney in June, 1981, in accordance with the terms of the Court's Order, it became apparent that the Trial Judge had sought the assistance of counsel for the wife in the preparation of the May 18 Order.

This information was developed further at a hearing held on November 11, 1981. The purpose of that hearing was to take testimony on reasonable suit fees and costs for the wife.

Thereafter, the husband moved the South Carolina Supreme Court for a new trial, for an Order disqualifying the Lower Court Judge, for an Order transferring the cause from the Fourth Judicial Circuit to an adjoining circuit, for a trial *de novo*, for an Order requiring the wife's counsel to reimburse the husband for attorney's fees, costs, suit money and expenses heretofore advanced to them and various other relief, all as described in Appendix K of the husband's Petition to this Court.

The facts relied on by the wife before the South Carolina Supreme Court and the wife's position are contained in the Appendix consisting of a letter from the Trial Judge (Appendix A), the Affidavits of Mr. Rogers (Appendix B) and Mr. Easterling (Appendix C), and the wife's Return to the Petition, (Appendix D).

It was the wife's position in the State Court that the procedure of the Court was not in accordance with Rule 24 of that Court. Rule 24 is attached in Appendix L. That rule provides that in a case which is pending upon appeal in the Supreme Court the proper procedure is to move for leave to make a Motion for a new trial in the Lower Court rather than move before the Court for a new trial. With respect to disqualification of Judges, the rule is that the Motion must first be made before the Judge whose disqualification is sought. No such Motions were made in this case.

Even if it be argued that Rule 24 is not applicable, it is basic that issues first be decided in the trial courts. The purpose of the appellate courts is to review orders of the lower courts.

Therefore, the procedure set forth by Rule 24 of the South Carolina Supreme Court being a neutral procedure of long standing with a clear relationship to an orderly presenta-

tion of appellant matters to that court, was not followed. The South Carolina Supreme Court was entirely justified in determining that Petitioner's Motion, improperly presented to that Court, was without merit on the basis that it was in fact improperly presented. The South Carolina Supreme Court did not articulate the precise basis for its determination that the Motions were without merit. However, that Court is well-known for its insistence on adherence to its appellate rules. Therefore, it would be highly speculative for this Court to determine that the South Carolina Supreme Court had, in fact, ruled on the putative Federal question alleged to be involved here when that Court did not so state.

The central issue which Petitioner attempted to present was whether a conference between the Trial Judge and one of the attorneys of record, within a month after the conclusion of taking the testimony, and after the Trial Judge had made a determination of the case, called for the purpose of requesting the lawyer to prepare a proposed Order and giving him instructions on its preparation, is ground for the disqualification of the Trial Judge and other Judges and the reversal of his decision.

The practice complained of is routine in the Trial Courts of South Carolina, particularly the Family Courts. It is likely the Court concluded the husband's complaint frivolous.

The South Carolina Supreme Court very properly dismissed the husband's Motions.

The husband thereafter petitioned the Court for an explanation of its grounds for dismissing his Motions. The obvious reply cam from the Supreme Court that the Motion filed was without merit whether for procedural of substantive reasons and the second Motion filed seeking explanation was likewise without merit.

It is the wife's contention that this Petition to the United States Supreme Court is frivolous and is likewise devoid of merit.

REASONS FOR DENYING THE PETITION

1. The January 7, 1982 Opinion of the South Carolina Supreme Court, which Petitioners seeks to have this Court review on certiorari, is not a final judgment or decree as is required by 28 U.S.C. §1257.

28 U.S.C. §1257 provides that only "Final judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court ...." Generally, the State Court judgment or decree must be final in two (2) respects. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of the final Court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551.

"The finality requirement of 28 U.S.C. §1257, which limits our review of state court judgments, serves several ends; (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issue to leave a minimum federal intrusion in state affairs." *North Dakota Board of Pharmacy v. Snyders Drug Stores, Inc.*, 414 U.S. 156, 159.

"[A]n important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved." *Costarelli v. Massachusetts*, 421 U.S. 193, 196. The Court has noted that "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final judgment rule to preclude review "where anything further remains to be

determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124.

An appellant must generally exhaust all opportunities for review by the state courts before the Supreme Court will hear a matter. *Stratton v. Stratton*, 239 U.S. 55. *Gorman v. Washington University*, 316 U.S. 98. Here Petitioner has clearly not exhausted his state appellate remedies. His appeal to the South Carolina Supreme Court on the merits of the case is still pending.

Petitioner argues that he was deprived of his property without due process of law by the Order issued on January 7, 1982 when the South Carolina Supreme Court refused to vacate or reverse the trial judge's order of May 18, 1981. In fact, Petitioner still retains title to his property pending the determination of his appeal of the Order of May 18, 1981 on its merits.

It is entirely possible that in the future determination of this appeal the South Carolina Supreme Court will grant to Petitioner all the relief sought. In view of the lack of merit of Petitioner's position, this is unlikely, but cannot be ruled out until a final disposition of the case.

Petitioner may yet make additional motions and/or appeals. In fact he has filed five (5) separate appeals, various motions and petitions. *See* Appendix G, H, I, J, K. Additional federal questions may arise in the anticipated appeals process. Petitioner's appeal to the South Carolina Supreme Court will not be barred or rendered moot in any way if Respondent prevails in this action, nor will the issues which Petitioner seeks to raise in this appeal, specifically the division of marital property, be finally determined in state court until the South

Carolina Supreme Court hands down its decision.

In summary, Respondent respectfully submits that the finality requirement of 28 U.S.C. §1257 is absent and therefore jurisdiction should be denied.

2. Respondent respectfully submits that this case is solely and exclusively a domestic controversy.

Family law has traditionally been the exclusive province of state courts specially equipped to handle such matters. See *Ridgway v. Ridgway*, ____ U.S. ____, 102 S. Ct. 49, *McCarty v. McCarty*, ____ U.S. ____, 101 S. Ct. 2728, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, *In re Burrus*, 136 U.S. 586. The Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Ridgway v. Ridgway, supra at 54*, quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-126. "State family and family property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden". *Hisquierdo, supra at 581*. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States". *In re Burrus*, 136 U.S. 586, 593-594. Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question. *Hisquierdo, supra* at 580, *Ohio ex rel Popovici v. Agler*, 280 U.S. 379.

Petitioner has asserted no important and compelling federal question which would necessatate a hearing by the Supreme Court. The gravamen of Petitioner's complaints is a contention that a conference between the Wife's attorney and the trial judge on March 27, 1981 resulted in an order which divested him of property without due process of law.

Said conference was requested by the Trial Judge and

came more than one month after Petitioner and Respondent had concluded eleven full days of testimony before the Judge and had both submitted briefs to him.

Petitioner had ample opportunity to be heard both in court and through his Brief. The conference with Respondent's attorney took place only after the Judge had considered both Respondent and Petitioner's contentions and had made his decisions on each aspect of the case.

The Supreme Court will not assume jurisdiction to review a state judgment where the asserted federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous. *California Water Service Company v. Redding*, 304 U.S. 252, *Valley S.S. Co. v. Wattawa*, 244 U.S. 202, *St. Louis & S.F.R. Co. v. Shepherd*, 240 U.S. 240.

Petitioner has asserted a frivolous federal claim, and Respondent respectfully requests that jurisdiction be denied.

3. In any event, the decision of the South Carolina Supreme Court is plainly correct and does not warrant review.

The conference was held between the Trial Judge and one of the attorneys of record called by the Trial Judge more than a month after the conclusion of taking testimony, after the Trial Judge had made a determination of the case, and called for the sole purpose of requesting the attorney to prepare a proposed Order and giving him instructions therefor.

It is submitted that the practice complained of here is one that is common in the Trial Courts of South Carolina and of other States in the nation. This point will not be belabored. We ask the court to take judicial notice that this is the truth. It is covered in more detail in counsel's Affidavits attached hereto.

Whether this is a good rule or a bad rule, for so long as States do not make available to Family Court Judges additional staffing it is a necessity. We ask the court to take judicial notice of the workload of the Family Court Judges, of the fact that they have no law clerks and that their library facilities are limited. If the Trial Judges in the Family Court were required to prepare their own Orders, it is submitted that they could hear less than half the volume of cases they now hear and the backlog would swamp these courts.

This practice is not unique to South Carolina.

The preparation by participating counsel of Orders, findings of fact, and conclusions of law at the request of the Judge is a common practice. *See, e.g., Jefferson v. City of Anchorage,* 513 P.2d 1099 (Alaska 1973); *Schoenberg v. Benner,* 251 Cal. App. 2d 154, 59 Cal. Rptr. 359 (1967). Even where such a practice is not specifically authorized by statute or court rule, its observance does not deprive the Orders, findings or conclusions so rendered of their validity. *See South Side Lumber Co. v. Stone Construction Co.,* 151 W. Va. 439, 152 S.E.2d 721 (1967); *Globe Drilling Co. v. Cramer,* 39 Colo. App. 153, 562 P.2d 762 (1977); *Hayden v. Hayden,* 27 App. Div. 2d 976, 278 N.Y.S.2d 679 (1967), *appeal dismissed,* 21 N.Y.2d 773, 288 N.Y.S.2d 243, 235 N.E. 2d 227 (1968). Once they are adopted, they become the findings or conclusions of the court and are sufficient to satisfy the requirement that findings of fact supporting the conclusions of law be made. *See Wyoming Farm Bureau Mutual Insurance Co. v. May,* 434 P.2d 507 (Wyo. 1967); *South Side Lumber Co. v. Stone Construction Co., supra.* It is only where the court adopts the prepared findings or conclusions without serious examination and amendment, if required, that some courts see a danger in a Judge avoiding his judicial

functions. *See Pacific States Cast Iron Pipe Co. v. Roberts,* 489 P.2d 336 (Colo. App. 1971); *Kamuchey v. Trzesniewski,* 8 Wis. 2d 94, 98 N.W.2d 403 (1959).

The general rule is contained at §1256.5 of 76 Am.Jur.2d at page 208 which states in part:

> In a number of cases not mentioning statutes or court rules affecting the practice, courts have indicated, without any criticism of the practice and without imposing any specific limitations, that it is not improper in itself for a trial judge to adopt part or all of the findings proposed by counsel for the prevailing party. Probably no court which allows the practice would quarrel with the proposition that before adopting findings prepared by the prevailing party, the trial judge should carefully peruse them to establish that they accurately reflect his views and conclusions and adequately decide all the issues. On the other hand, it has been held in a few cases that where the findings of the trial judge are largely verbatim the findings submitted by the prevailing party, the appellant court will give them closer scrutiny than normally afforded.

There is an annotation on the subject contained at 54 A.L.R.3d commencing at page 868.

At page 870 the author of the annotation says that, "... no reported case has been found in which the objection has met with actual success at the appellant level." It further says that the court's reaction "... has ranged from a cavalier dismissal of objections to such practice raised by the appellant, with, for example, some such remark as the one that the contention must have been attributable to lack of knowledge of the fact that such was customary practice ..." See *Baker*

v. Cutting 1938 Iowa, 280 N.W. 548.

Petitioner's attorney is an experienced, veteran, Family Court lawyer. He knows that the practice of which he complains is customary. He himself has prepared orders for Family Court Judges. See Appendix A attached hereto.

> "Preparation of findings by counsel is in fact the customary practice in some jurisdictions, sometimes even with the sanction of court rule. For example, one of the court rules involved in *Fairbanks Builders, Inc. v. Morton De Lima, Inc.* (1971, Alaska) 483 P2d 194, 54 ALR3d 862, infra §[b]. stated that unless otherwise ordered, counsel for the successful party should prepare all findings of fact, conclusions of law, judgments, and order." 54 ALR3d 868, page 870 FN 1.

AS TO ETHICS AND PREJUDICE

It is submitted that a lawyer representing a litigant is also an officer of the Court. It is difficult to imagine any lawyer not responding to a summons from the Court. Obviously such a response is proper rather than improper.

All *ex parte* communications between a judge and an attorney are not prohibited by the *Code of Judicial Conduct*. Canon 3A(4) which might be argued as being applicable here does not provide that such communications are forbidden nor does it call for disqualification of the Judge and the vacating of his judgment. The specific language of the Canon provides for communications "as authorized by law." Under the common practice and custom of the Family Courts in South Carolina, the Court almost always requests one of the lawyers to prepare an Order after a decision has been made. This a regular practice, is known to be a regular practice, and

although there is no specific court rule authorizing it, such meetings are "authorized by law" and therefore do not constitute the type of *ex parte* communications prohibited by Canon 3A(4).

Finally, even if the meeting between the Judge and counsel in the instant case were deemed an *ex parte* communication, disqualification of the Judge and vacation of the judgment are not automatically warranted. Where no bias or prejudice is established, there is no ground for setting aside the court's decision. *See United States v. Brierley*, 315 F. Supp. 1392, 1397 (W.D. Pa. 1970) (private communication between judge and prosecutor involved only a procedural matter); *Carpenter v. State*, 223 Kan. 523, 575 P.2d 26, 29-30 (1978) (discussion involved no matter under consideration in the pending proceeding). In the present case, because the judge had already decided the merits of the case, it could be argued that the meeting called to discuss the preparation of the court's Order not only was merely a procedural matter, *see United States v. Brierley, supra,* but also did not involve a matter still under consideration as found in *Carpenter v. State, supra.*

CONCLUSION

It is submitted that at best the instant proceeding is misguided and unnecessary. At worst it is irresponsible and a continuation of over litigation of an overly litigated case. It is respectfully requested that the petitioner's request for a writ of certiori be denied.

Respectfully submitted,

EUGENE F. ROGERS
Post Office Box 58,
Columbia, South Carolina
29202, Attorney of Record

HARRY R. EASTERLING
Post Office Box 655,
Bennettsville, South Carolina
29512

Appendix

APPENDIX CONTENTS PAGE

Appendix A: Letter from Judge Gasque to Jan L. Warner and Eugene F. Rogers A-1

Appendix B: Affadavit of Eugene F. Rogers A-3

Appendix C: Affadavit of Harry R. Easterling A-7

Appendix D: Return to Husband's Motion for a New Trial A-10

Appendix E: Unreported decision of the South Carolina Supreme Court handed down on January 7, 1982 ..... A-18

Appendix F: Unreported decision of the South Carolina Supreme Court denying Petitioner's Motion for Clarification handed down on February 2, 1982 ..... A-19

Appendix G: Petitioner's Notice of Appeal of October 21, 1980 order A-20

Appendix H: Petitioner's Notice of Appeal of November 19, 1980 order A-21

Appendix I: Petitioner's Notice of Appeal of May 18, 1981 order A-22

Appendix J: Petitioner's Notice of Appeal of order received by Petitioner on April 19, 1982 ..... A-23

Appendix K: Petitioner's Notice of Appeal of May 4, 1982 order A-24

Appendix L: Rule 24, Rules of Practice of the South Carolina Supreme Court A-25

Appendix M: Order of Lower Court of May 4, 1982 setting fees and costs A-26

APPENDIX A

FOURTH JUDICIAL CIRCUIT FAMILY COURT
DILLON, SOUTH CAROLINA 29536

December 7, 1981

Mr. Jan L. Warner
Attorney at Law
Post Office Box 2347
Sumter, South Carolina 29150

Mr. Eugene F. Rogers
Attorney at Law
Post Office Box 58
Columbia, South Carolina 29202

Re: Anderson vs. Anderson

Gentlemen:

I understand some question has arisen about the conference which I had in my office in Dillon on March 27, 1981, with Mr. Rogers.

The conference was held for the purpose of asking Mr. Rogers if he would assist the Court in the preparation of the Court's Order. After I made up my mind on the various issues, I had asked him to come by my office in Dillon so I could give him instructions.

My request that he come by was in accordance with the general practice and custom in the Family Courts of South Carolina. Both of you are fully aware of this custom and practice. Both of you have prepared Orders for me in the past. In this case, after I had talked with Mr. Rogers, Mr. Warner called me in my office and asked if he could assist with the preparation of the Order. I declined his offer and told him I was working on the Order.

Yours very truly,

S. Norwood Gasque

SNG/jh

APPENDIX B

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME Eugene F. Rogers, who first being duly sworn, deposes and says as follows:

I am one of the attorneys representing Mrs. Joanne E. Anderson in an action which was instituted in the Family Court of the Fourth Judicial Circuit in May of 1979. I was initially contacted by Harry R. Easterling of the firm of Goldberg, Cottingham and Easterling in Bennettsville in June, 1979, and have since that time represented Mrs. Anderson along with Mr. Easterling. The trial of the case has been difficult. The history of the litigation as contained in Petitioner's Brief to the lower court at pages one (1) through six (6) thereof is attached hereto. The issues were complicated and complex, as reference to the final Order attached as one of husband's exhibits hereto will more clearly show. These issues involved: (1) custody of the children, (2) support for the children, (3) education for the oldest daughter who was graduating from high school, (4) alimony, (5) attorneys' fees and costs, (6) value of property. The latter included: (a) the appraisal of eight (8) parcels of real estate, (b) the value of a tobacco allotment, (c) the establishment of the values of some twelve (12) bank accounts or savings accounts and a bond totalling in excess of One hundred twenty-nine thousand and no/100 ($129,000.00) dollars, (d) the valuation of a civil service retirement plan, (e) a life insurance retirement plan, (f) valuation of four (4) insurance policies, (g) valuation of household goods, (h) valuation of china, crystal and silver, (i) the depreciated value of farm equipment. (j) ascertainment of assets owned by the parties at the time of their marriage, (k) the value of gifts to them, (l) the value of bequests to Mr.

Anderson, (m) miscellaneous gifts to the parties or their children, (n) increases in the value of real estate caused by inflation and (o) application of the law in the evolving area of equitable distribution to these facts. There were other issues including amendments to the pleadings, evidence, etc.

The trial of the case consumed eleven (11) days in addition to other hearings. Testifying in the cause were three (3) professors from the University of South Carolina School of Business Administration each of whom held a doctorate degree, a tax lawyer who was also a Certified Public Accountant, a psychiatrist, and numerous lay witnesses. All issues were vigorously contested.

The hearings were ended on February 20, 1981. Sometime after the hearings were ended the Trial Judge requested that I come by his office in Dillon to discuss the case. I readily agreed. The Judge was available on the afternoon of March 27 and that time was convenient for me. I was not surprised. I felt under the facts and the law that the result was predictable on most issues within certain parameters and that in general the Court would have no choice but to rule with the Wife.

The custom and practice in South Carolina particularly in the Family Courts has been for the Trial Judge, once he makes up his mind on how he plans ruling, to ask that one of the lawyers prepare a proposed Order disposing of the issues. Our Family Court Judges do not have law clerks and their library facilities are limited. They usually ask the lawyer in whose general favor a ruling is to be made to prepare the proposed Order, although I have known of Judges, who, for some reason or other, have asked the losing lawyer to prepare the Order. This is rare.

On Friday morning, March 27, I drove from Columbia to Bennettsville where I discussed various phases of the case with Harry Easterling, co-counsel, all as outlined in testimony

given at a hearing to set attorneys' fees attached hereto. Mr. Easterling and I discussed the case and had lunch. After lunch I drove to Dillon and, as requested, reported to the Trial Judge's chambers. Upon arrival, I was advised that the Court had made its decisions and I was asked to prepare a proposed Order in accordance with instructions which were then given me in my role as an officer of the Court.

The instructions disclosed some decisions which were favorable to the Wife and some which were unfavorable to her. Some were favorable to the Husband and some unfavorable. Both parties appealed the Order.

The complexity of the litigation and its issues was such that it took about an hour for the Trial Judge to outline his findings of fact, conclusions of law and other determinations. I left the chambers of the Court and returned to Columbia.

This conference with the Court was handled in accordance with the practice and custom in our Family Courts for as long as I have been practicing law. It is a common and customary practice throughout the state. It also is and has been a common practice at the Circuit Court level for generations although, with the advent of law clerks, some Circuit Court Judges are preparing their own Orders. In the Family Court system I occasionally receive an Order which I believe the Family Court may have prepared, but the receipt of such an Order is rare and is an exception rather than the rule.

In many instances, instructions are given by telephone rather than in chambers, but this case was complex, had many issues and involved large sums of money and property. It is for this obvious reason that the Court requested a conference in chambers rather than giving instructions by telephone.

There was nothing secretive, surreptitious or clandestine

about the conference. I called it to the attention of counsel for the Husband when I included the conference in a bill submitted prior to a hearing on attorneys' fees. Mr. Easterling referred to it in a bill submitted in June, 1981.

There were errors and omissions in the bills and in the interest of accuracy corrections were made, hence the discrepancies as to time, etc., pointed out by the Husband. There were other refinements made in the bills once it became apparent that the suggestion of the Court that the parties try to reach agreement was futile. (See lines five (5) and six (6) of page thirty-four (34) of the Court Order under Attorneys' Fees.)

Counsel for Mr. Anderson, Jan L. Warner, is an experienced Domestic Relations lawyer. I suspect that in those cases in which his client was the successful litigant he too has drafted proposed Orders and Decrees at the request of the Court. In any event, I find it difficult to believe that he is unaware of the practice.

EUGENE F. ROGERS

SWORN to before me this
25th day of November, 1981.

Donna B. Hall (L.S.)
Notary Public for South Carolina

My Commission Expires: 4/20/91.

APPENDIX C

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF MARLBORO)

PERSONALLY appeared before me, the undersigned Harry R. Easterling, who, being first duly sworn, deposes and says:

1. The Lower Court Judge, in his Order dated May 18, 1981, directed the attorneys for Petitioner to prepare a statement covering services rendered and submit the same to the Respondent, along with an itemization of the costs paid out within fourteen (14) days of the Order. A copy of this portion of the Order is attached.

2. Pursuant to the Order of the Lower Court Judge, a copy of my bill for legal services and costs was forwarded to Attorney Jan L. Warner on June 5, 1981. My file copy of the forwarding letter is attached.

3. My statement dated June 4, 1981, a copy of the file copy being attached, reflected on Page Five the following:

3/27/81 Conference with Judge Gasque
and Atty. Rogers; travel to Dillon 5.50

My costs and expenses entered on Page Six of the statement reflected the following:

1 trip to Dillon and return
52 miles at 18½ cent per mile 9.62

I would note parenthetically that this information was available to Attorney Jan L. Warner on or about June 5, 1981, and no inquiry was made by him concerning this entry prior to a hearing on attorney fees on November 12, 1981.

4. In preparing my testimony for the November 12, 1981, hearing I became aware of the incorrect entry on Page

Five of my June 4, 1981, bill to Mrs. Joanne E. Anderson. I revised Page Five and forwarded a copy of my revised Page Five to Attorney Jan L. Warner by letter dated November 10, 1981. A xerox copy of that letter is attached. This revision also required a correction on Page Six and a revised Page Six was also forwarded. Xerox copies of the revised Page Five and revised Page Six are attached.

5. While I corrected my March 27, 1981, entry to reflect a conference with Attorney Rogers lasting three (3) hours, I did not catch the need to delete the costs and expenses entry of the trip to Dillon. My testimony concerning this matter appears on the Transcript of Record which is attached to this Affidavit.

6. At the hearing on the matter of attorney fees on Thursday, November 12, 1981, I testified under oath regarding this matter. A xerox copy of pages 19, 20, and 34 through 40 of the Transcript of Record provided by Ms. Jean Huggins, Court Reporter, Route 1, Box 150, Nichols, South Carolina 29581, is attached.

7. I did not go to Dillon, South Carolina, on March 27, 1981, and, therefore, did not have a conference with Judge Gasque in Dillon on that date. It is my understanding that Attorney Eugene F. Rogers did meet with Judge Gasque in Dillon that date.

8. While I did not go to Dillon on the 27th day of March, 1981, I see no impropriety with Attorney Rogers conferring with the trial Judge to receive instructions on assisting the Court with a proposed Order. On the basis of twenty-three (23) years of practice as an attorney licensed to practice in the State of South Carolina, I fully recognize the custom and practice of Family Court Judges and other judges having one

lawyer or the other prepare a proposed Order in cases such as this.

9. The Anderson divorce case was a very difficult case, fully adversary in every particular, and the Court's Order is thirty-five (35) pages long. It appears to me that the trial Judge would need and require the assistance of the attorney on one side or the other to prepare an Order for his review, consideration and approval or rejection in whole or in part, given the work load of the Court and the limitations on staff and funding imposed on the Courts by the General Assembly.

SWORN to before me this

24th day of November, 1981
Harry R. Easterling (SEAL)

Linda W. McCall (L.S.)
Notary Public for South Carolina

My commission expires: 3/2/89

APPENDIX D

BY WAY OF RETURN TO THE HUSBAND'S VERIFIED MOTION FOR A NEW TRIAL, WIFE ALLEGES:

1. Wife admits the allegations of paragraphs one (1) and two (2) and in connection therewith alleges that Husband in his Answer denied Wife was entitled to relief, sought custody of the children and asked that Wife be required to vacate the family home.

2. Wife admits paragraphs three (3) and four (4) and in connection therewith alleges the June 18 Petition was required by Husband's failure to provide shelter, food or support for Wife and children.

3. In connection with the allegations of paragraph five (5) Wife alleges that Husband failed to comply with the court's Order of June 22, 1979, and she had no choice but to file the Petition which was filed.

4. The allegations of paragraphs six (6), seven (7) and eight (8) are admitted and in connection therewith Wife alleges that the Orders of November 29 and December 13 were issued at different times because the trial judge made decisions at different times. The first Order was announced in open court and the court took the second matter under advisement. In connection with paragraph eight (8) Husband had sought to delete certain verbiage from Wife's proposed Amended Petition and the Amended Petition of April 4 was served and filed because of his objection.

5. In connection with the allegations of paragraph nine (9) Wife alleges that on April 11 Husband filed and served some seventeen (17) pages of pleadings in which he sought the following:

1. "A complete psychiatric evaluation of the family, unit, including the children of the parties hereto;"
2. A directive that Wife "be required to pay the

Respondent's counsel reasonable fees and costs for the defense hereof;"

3. A directive that Wife be required to repay Respondent "the sums which Respondent has been required to pay for her temporary attorneys' fees and suit money;"
4. A directive with respect to the Wife's half interest in the family home that she be required to transfer her interest therein to Respondent;
5. An adjudication that Husband was entitled to an equitable division of the Petitioner's educational degree and postgraduate training on the theory that the degree was an asset contributed to by the Husband;
6. A directive that all bank accounts, certificates of deposit and other assets be determined to belong to the Husband without claim by the Wife;
7. A directive that Wife's retirement plan which was the result of her teaching school should be declared to be subject to equitable division and a share thereof granted Husband;
8. An adjudication that the amounts agreed as reasonable by the Husband at the November 15 hearing were excessive and an Order for reimbursement of the excess;
9. An order that the Husband be granted custody of the three (3) minor daughters of the marriage;
10. An Order requiring Wife to pay child support to the Husband;
11. An adjudication that Petitioner's action was frivolous in nature and was known by her to be frivolous and asking its dismissal with costs;

12. A comprehensive discovery Order.

6. That the allegations of paragraphs ten (10) and eleven (11) are admitted and in connection therewith Wife alleges that the Husband failed to make support payments as required by the Order of November 29, 1979, and failed to comply with a discovery Order issued by consent in June of 1980, necessitating a hearing held on October 14, 1980, at which time the court granted, in part, among other things, a request by the Wife for sufficient funds to assist in the employment of appraisers and other experts necessary to prove her case. Wife alleges that by this time what had initially appeared as an ordinary divorce in November, 1979, had, after the employment of Mr. Warner, escalated into major litigation.

7. That the allegations of paragraphs twelve (12), thirteen (13) and fourteen (14) are admitted and in connection therewith the Wife alleges that the hearing of November 19, 1980, was necessitated by: (A) the Husband's objection to a deposition of his economist, (B) the failure of the Husband and his counsel to comply with Rule 22 of the Family Court Rules, (C) the Discovery Order of June, 1980, and (D) the spirit of a pretrial conference held on October 14, 1980, and was further necessitated by the failure of the Husband to show appraisers the location and boundaries of his real estate and his failure to concede that they had appraised the right parcels of real estate and his failure to acknowledge the accuracy of a tobacco allotment. The Husband appealed from the Court's Order granting relief.

8. The allegations of paragraphs fifteen (15) through nineteen (19) are admitted, and in connection with the allegations of paragraph twenty (20) Wife alleges that oral argument was cancelled by letter of March 17, 1981, following

a request of the Husband's lawyer.

9. That in connection with the allegations of paragraph twenty-two (22) the Wife alleges that sometime before March 27, 1981, the court requested a conference with one of her attorneys, Eugene F. Rogers, and in compliance therewith he met with the court in Dillon on the afternoon of March 27 for about an hour at which time the court advised that decisions had been made in the case and requested the assistance of counsel in the preparation of a proposed Order dealing with the multiple issues presented to the court. In connection therewith Wife alleges that the disposition of these issues were not satisfactory to her nor were they satisfactory to the Husband, and that appeals from the Order as executed by the trial judge have been taken by both parties. Wife further alleges that this conference was held in accordance with the general custom and practice prevailing in South Carolina and that there were no improprieties in connection therewith and further alleges that she is informed and verily believes that instructions and directions to counsel would have been difficult had both attorneys been present given the atmosphere and climate of the trial and the zeal employed by both attorneys in the advocacy of their respective clients. Wife further alleges that the scheduling of the conference for the afternoon of the morning scheduled for oral argument was coincidental and that it could have just as easily been scheduled earlier or later.

10. That the allegations of paragraph twenty-three (23) are admitted.

11. That the allegations of paragraph twenty-four (24) are denied and in connection therewith the Wife alleges that the court failed to adequately and fairly grant an equitable amount of the jointly acquired property to her as reference to

exceptions contained in her appeal to this court will disclose and further alleges that the affidavits and charts of Elizabeth Bryan referred to therein have been explicitly ruled out of the evidence by the trial court, that they are erronerous, contain material errors of fact and law, do not apply the state and federal income tax laws accurately nor adequately and further alleges that the litigation expenses referred to therein are the result of the Husband's stubborn, perverse, rebellious and irresponsible insistance on overly litigating every issue all as reflected by the record herein and by the Orders of the lower court.

12. In connection with the allegations of paragraph twenty-five (25) the Wife alleges that under the custom and practice in South Carolina in the Family Courts there is no requirement that the trial court notify counsel that a decision has been made prior to the execution and filing of the Order but further alleges that although there is no requirement for notice, notice was given of the conference as early as June, 1981, and thereafter through inclusion of the time consumed in the conference by her counsel in documents freely supplied Husband in connection with attorney's fees hearing and in connection therewith Wife calls attention to the Affidavits of Eugene F. Rogers and Harry R. Easterling for an accurate statement of what occurred.

13. In connection with the allegations of paragraphs twenty-seven (27) through thirty-two (32) reference is had to the Affidavits of her attorneys and the transcript copies of which are attached hereto for an accurate account of what transpired however, in connection with these allegations Wife alleges that the amendments supplied Husband were among a number of corrections and refinements to bills submitted and were supplied in accordance with the spirit of the Order which

said, "Hopefully, the parties can reach agreement on costs expended, fees paid and a fair and reasonable fee for the attorneys representing Petitioner." Wife further alleges that paragraph twenty-eight (28) is incorrect, that Mr. Easterling's correction was hand delivered before November 12, 1981, to Husband's lawyer.

14. Wife denies the interpretation placed on testimony of Mr. Rogers and Mr. Easterling and alleges the proper interpretation is as contained in their respective Affidavits.

15. That the allegations of paragraphs thirty-three (33), thirty-four (34), thirty-five (35) and thirty-six (36) are denied and in connection therewith Wife realleges that the conference complained of was held in accordance with the prevailing practice and custom in the Family Courts of South Carolina and further that there was no conference in Bennettsville as described.

16. That in connection with the allegations of paragraph thirty-seven (37) the Wife agrees that the record is extensive but alleges that the length of the record in this case, like the length of the record in *Cole v. Cole*, 274, S.C. 449, 265 S.E.2d 669 (1981) (the record there was only one thousand one hundred [1,100] pages, counsel here has stretched it out to over one thousand eight hundred [1,800] pages, surpassing his record there) is the result of the stubborn insistance on making mountains over matters which did not amount even to a molehill and irrationally litagating issues where the facts were clean and the law plain and unambigious by Husband and his lawyer.

17. The allegations of paragraph thirty-eight (38) are admitted, and in connection therewith Wife alleges that actions of Husband and his attorney continue to delay the final resolution of the matter and further that delay accrues to

the Husband's benefit by reason of the difference between legal interest rates on judgments and market rates.

18.That the remaining allegations of the Motion for a new trial are denied but in connection with the allegations of paragraph forty-two (42), Wife denies that the court Order is oppressive to the Husband and alleges that it in part corrects oppressive behavior of the Husband in taking her earnings over a period of almost nineteen (19) years, investing it in his name, refusing to permit her to have any part of it and then seeking approval by the court of this behavior.

RETURN TO HUSBAND'S AFFIDAVIT

By way of response to the Husband's Affidavit the Wife alleges that its contents are largely repetitious, that in addition she has responsed thereto in this return, and matters not responded to are immaterial.

RETURN TO AFFIDAVIT OF MS. BRYAN

This material was specifically ruled out of evidence as being improper by the Trial Court, and is immaterial to the issue before this court. In addition thereto it is generally inaccurate, incorrect, does not correctly state either the facts nor the Federal or State Income Tax Law applicable thereto and should be ignored.

WHEREFORE, Wife prays that the court dismiss the Husband's request for relief.

ROGERS, McDONALD, McKENZIE, FULLER AND RUBIN

BY: EUGENE F. ROGERS

GOLDBERG COTTINGHAM AND EASTERLING

BY: HARRY R. EASTERLING

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF RICHLAND)

PERSONALLY appeared before me Joanne E. Anderson, who being duly sworn, deposes and says that she is the Respondent-Appellant in the foregoing proceeding and that she has read the foregoing Return to Petitions and that the facts stated therein are true of her own knowledge except those matters and things therein alleged on information and belief and as to those she believes it to be true.

JOANNE E. ANDERSON

SWORN to before me this
21 day of Nov., 1981.

EUGENE F. ROGERS (L.S.)
Notary Public for South Carolina

My Commission Expires: Sept. 26, 1990

APPENDIX E

THE SUPREME COURT OF SOUTH CAROLINA

January 8, 1982

Jan. L. Warner, Esquire
P. O. Box 2347
Sumter, South Carolina 29150

Re: Anderson v. Anderson

Dear Mr. Warner:

The following Order has been endorsed on your Motions in the above matter:

"Motions denied.

s/J. Woodrow Lewis C.J.

January 7, 1982."

Very truly yours,

s/Reba D. Mims
Deputy Clerk

/BS

cc: Eugene F. Rogers, Esquire
P. O. Box 58
Columbia, South Carolina 29202

R. Harry Easterling, Esquire
P. O. Box 655
Bennettsville, South Carolina 29512

APPENDIX F

THE SUPREME COURT OF SOUTH CAROLINA

February 2, 1982

Jan L. Warner, Esquire
P. O. Box 2347
Sumter, South Carolina 29150

Re: Joanne E. Anderson v. Bunyan W. Anderson

Dear Mr. Warner:

Your Motion for Clarification has been considered by the Court and the following Order endorsed thereon:

"Previous Motion denied without merit; likewise the present Motion is without merit.

s/J. Woodrow Lewis, Chief Justice
February 2, 1982."

Very truly yours,

s/Frances H. Smith
Clerk

FHS/chh

cc: Eugene F. Rogers, Esquire

APPENDIX G

NOTICE OF INTENTION TO APPEAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM MARLBORO COUNTY

THE HONORABLE S. NORWOOD GASQUE, JUDGE

FAMILY COURT FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NUMBER 79-DR-34-166

Bunyan W. Anderson,	)	
	)	
Appellant,	)	
	)	
— against —	)	NOTICE OF APPEAL
	)	
Joanne E. Anderson,	)	
	)	
Petitioner-Respondent	)	
	)	

The Appellant does hereby appeal from the Order of the Honorable S. Norwood Gasque, Judge, Family Court, Fourth Judicial Circuit, dated October 21, 1980 and received by Appellant's counsel on October 24, 1980.

JAN L. WARNER

BY: JAN L. WARNER
ATTORNEYS FOR APPELLANT
Post Office Box 2347
Sumter, South Carolina 29150

OTHER COUNSEL OF RECORD ARE:

EUGENE F. ROGERS
Rogers, McDonald, McKenzie,
Fuller & Rubin
Attorneys at Law
Post Office Box 58
Columbia, South Carolina 29202

APPENDIX H

NOTICE OF INTENTION TO APPEAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM MARLBORO COUNTY

THE HONORABLE S. NORWOOD GASQUE, JUDGE

FAMILY COURT FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NUMBER 79-DR-34-166

Joanne E. Anderson,	)	
	)	
Respondent,	)	
	)	
— against —	)	NOTICE OF APPEAL
	)	
Bunyan W. Anderson,	)	
	)	
Appellant	)	
	)	

The Appellant does hereby appeal from the Order of the Honorable S. Norwood Gasque, Judge, Family Court, Fourth Judicial Circuit, dated November 19, 1980 and received by Appellant's counsel on the 25th day of November 1980.

JAN L. WARNER
BY: JAN L. WARNER
ATTORNEY FOR APPELLANT
Post Office Box 2347
Sumter, South Carolina 29150

OTHER COUNSEL OF RECORD ARE:

EUGENE F. ROGERS
ROGERS, McDONALD, McKENZIE,
FULLER & RUBIN
ATTORNEYS FOR RESPONDENT
Post Office Box 58
Columbia, South Carolina 29202

APPENDIX I

NOTICE OF INTENTION TO APPEAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM MARLBORO COUNTY

THE HONORABLE S. NORWOOD GASQUE,
CHIEF JUDGE

FAMILY COURT FOR THE FOURTH
JUDICIAL CIRCUIT

DOCKET NUMBER 79-CR-34-166

Joanne E. Anderson,	)	
	)	
Respondent,	)	
	)	
— against —	)	NOTICE OF APPEAL
	)	
Bunyan W. Anderson,	)	
	)	
Appellant	)	
	)	

The Appellant does hereby appeal from the Order of the Honorable S. Norwood Gasque, Chief Judge, Family Court, Fourth Judicial Circuit, dated May 18, 1981 and received by Appellant's counsel on the 23rd day of May, 1981.

JAN L. WARNER
BY: JAN L. WARNER
ATTORNEY FOR APPELLANT
Post Office Box 2347
Sumter, South Carolina 29150

OTHER COUNSEL OF RECORD ARE:

EUGENE F. ROGERS
ATTORNEY FOR RESPONDENT
Post Office Box 58
Columbia, South Carolina 29202

May 26, 1981

APPENDIX J

NOTICE OF INTENTION TO APPEAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM MARLBORO COUNTY

THE HONORABLE S. NORWOOD GASQUE,
CHIEF JUDGE

FAMILY COURT FOR THE FOURTH
JUDICIAL CIRCUIT

DOCKET NUMBER 79-DR-34-166

Joanne E. Anderson,	)	
	)	
Respondent,	)	
	)	
— against —	)	NOTICE OF APPEAL
	)	
Bunyan W. Anderson,	)	
	)	
Appellant	)	
	)	

The Appellant does hereby appeal from the undated Order Settling the Record of the Honorable S. Norwood Gasque, Chief Judge, Family Court, Fourth Judicial Circuit, which was received by Appellant's counsel on the 19th day of April, 1982.

JAN L. WARNER
C. DIXON LEE, III
ATTORNEYS FOR APPELLANT
Post Office Box 2347
Sumter, South Carolina 29150

OTHER COUNSEL OF RECORD ARE:

EUGENE F. ROGERS
ROGERS, McDONALD, McKENZIE,
FULLER & RUBIN
ATTORNEYS FOR RESPONDENT
Post Office Box 58
Columbia, South Carolina 29202

APPENDIX K

NOTICE OF INTENTION TO APPEAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM MARLBORO COUNTY

THE HONORABLE S. NORWOOD GASQUE,
CHIEF JUDGE

FAMILY COURT FOR THE FOURTH
JUDICIAL CIRCUIT

DOCKET NUMBER 79-DR-34-166

Joanne E. Anderson,	)	
	)	
Respondent,	)	
	)	
— against —	)	NOTICE OF APPEAL
	)	
Bunyan W. Anderson,	)	
	)	
Appellant	)	
	)	

The Appellant does hereby appeal from the Order of the Honorable S. Norwood Gasque, Chief Judge, Family Court, Fourth Judicial Circuit, dated May 4, 1982 and received by Appellant's counsel on the 6 th day of May, 1982.

JAN L. WARNER
C. DIXON LEE, III
ATTORNEYS FOR APPELLANT
Post Office Box 2347
Sumter, South Carolina 29150

OTHER COUNSEL OF RECORD ARE:

EUGENE F. ROGERS
ROGERS, McDONALD, McKENZIE,
FULLER & RUBIN
ATTORNEYS FOR RESPONDENT
Post Office Box 58
Columbia, South Carolina 29202

May 7, 1982

APPENDIX L

Rule 24

Motions for new trials upon after-discovered evidence

The following practice shall be observed in the matter of motions for new trials upon after discovered evidence:

First: in a case in which the Circuit Court has not been deprived of jurisdiction by appeal or otherwise the motion may be made in the Circuit Court.

Second: In a case which is pending upon appeal in the Supreme Court, the motion may not be made in the Circuit Court until after the Supreme Court by order upon motion thereof, shall have suspended the appeal and granted leave to the movant to make the motion in the Circuit Court.

Third: In a case in which the appeal has been disposed of by the Supreme Court and the remittitur transmitted to the Circuit Court, the motion may not be made in the Circuit Court until after the Supreme Court, by order upon motion, shall have granted leave to the movant to make the motion in the Circuit Court; and when the defendant shall be under sentence of death the motion in the Supreme Court must be made not later than the 10th day before the day assigned for the execution of the sentence (exclusive of said day), and upon four days previous notice to the Solicitor, with copies of the moving papers.

APPENDIX M

STATE OF SOUTH CAROLINA	)	
	)	IN THE FAMILY COURT OF THE
COUNTY OF MARLBORO	)	FOURTH JUDICIAL CIRCUIT
Joanne E. Anderson,	)	Docket No. 79-DR-34-166
	)	
Petitioner,	)	
	)	
	)	
—vs-	)	ORDER
	)	
	)	
Bunyan W. Anderson,	)	
	)	
Respondent.	)	

For a history of the case reference is had to the Order of this Court dated May 18, 1981. In that Order the Court reserved decision on attorneys' fees and had this to say with respect thereto:

> The remaining issue relates to attorneys' fees. I find that the cost of the action, including attorneys' fees, witness fees and other costs, should be borne by the husband. The parties have agreed to defer consideration of the amount of these costs and fees until the Order of the court. Hopefully, the parties can reach agreement on costs expended, fees paid and a fair and reasonable fee for the attorneys representing Petitioner. I believe attorneys for Petitioner should prepare a statement covering services rendered and submit same to Respondent along with an itemization of costs paid out within fourteen (14) days of the date of this Order. In the meantime, and in order to avoid delay, I am requesting that the

clerk schedule a day to take testimony, in the event the parties cannot agree, on the first convenient day, no earlier than thirty (30) days from this date.

The attorneys for petitioner prepared statements covering services rendered and an itemization of costs paid out, including an itemization of witness fees paid or incurred, but no agreement was reached on any part of the costs, attorneys fees or witness fees and no agreement having been reached, counsel for Petitioner requested a hearing and after notice, the matter came on to be heard before me in the Marlboro County Courthouse on Novembr 12, 1981.

It was the wife's position that she was entitled to an award in accordance with the court order of May 18, including expenses and attorneys' fees incurred through the conclusion of the hearings before the Court on November 12, 1981. The evidence disclosed an appeal to the South Carolina Supreme Court and she sought fees and costs in connection with that proceeding. The recapitulation of costs and fees as contained on page 97 (a) of an exhibit filed by her and introduced without objection into evidence showed a total claim of One hundred fourteen thousand one hundred twenty-two and 54/100 ($114,122.54) dollars. In addition it was her position that future fees and costs and costs now accrued but unbilled or unrecorded should also be paid by the husband. In support of her contentions, she called four (4) witnesses, to wit: her present two (2) attorneys and two (2) distinguished expert witnesses, to wit Edward E. Saleeby, Esquire, of the Darlington Bar, and Robert J. Thomas, Esquire, of the Richland County Bar.

It was the position of the Respondent that the Court should not award attorneys' fees nor costs because Petitioner

had sufficient means to provide her own fees. It was his contention that the wife's necessity is the issue and that she must carry the burden to show the existence of the facts justifying her husband's making the payments. (T 85-L 24 & 25) It was his contention that counsel fees was an extension of the right to alimony and that Mrs. Anderson should bear all or a substantial portion of her own attorneys' fees. (T-86) He sought to show that Mrs. Anderson was more financially capable of assisting in the payment of her fees than was the husband.

The issues raised by Respondent as to entitlement and as to the respective abilities of the parties to pay was considered by the Court and covered by the Order of May 18, 1981.

It was the further position of Respondent that in any event attorneys' fees of Twenty-five to Thirty thousand and no/100 ($25-30,000.00) dollars would be fair and reasonable and that the cost of experts should be somewhere in the range of Seven to Ten thousand and no/100 ($7-10,000.00) dollars.

In connection with this aspect of the case, the same sharp differences that were described in the Court's original Order remained and there was little on which the parties agreed.

The South Carolina General Assembly has provided for the allowance of costs and attorneys' fees in divorce actions, with "reasonableness" being the standard:

> In every divorce action from the bonds of matrimony either party may in his or her complaint or answer or by petition pray for the allowance to him or to her of alimony and suit money and for the allowance of such alimony and suit money *pendente lite*. If such claim shall appear well founded the court shall allow a reasonable sum therefore. S.C. *Code* Sec. 20-3-120 (Cumulative Supplement)

Notwithstanding the former Order of the Court the Court has again reviewed the financial status of the parties and has reviewed the evidence taken at the trial which resulted in the Court's Order of May, 1981. It has also reviewed developments in the law of the State since the date of this Court's Order, May 18, 1981. It has reviewed *McCarty vs. McCarty*, 101 S.Ct. 2729 (1981) and *Carter vs. Carter*, (Smith's Advance Sheets, January 16, 1982) 286 S.E.2d 139, both subsequent to the Courts Order of May 18, 1981.

These cases relate to pension and retirement plans as marital property but do not apply retroactively.

The Court makes no determination as to the effect, if any, on its findings as to the value of marital property as contrasted with separate property had *Carter* (supra) been decided a year earlier.

While the Court holds and concludes that there is no viable issue as to whether or not the retirement plan of the husband and the retirement plan of the wife constitute marital property, it is apparent and I find and conclude that any reduction which might have been made in the wife's share of

marital property would be approximately balanced by an increase in alimony in gross awarded the wife. The husband's assets would have been increased correspondingly, and under *Carter* should be taken into consideration in an alimony award. Questions of alimony and equitable distribution can not be resolved with mathmatical certainty but rests with the discretion of the court. Thus, any increase in alimony and decrease in equitable distribution would balance each other out. Thus, even if *Carter* is to be applied retroactively, considerations of judicial economy would dictate that this Court's decision not be disturbed.

Having found that the wife was entitled to an award covering attorneys' fees, witness fees and other costs, the Court must now consider what would be a fair and reasonable award under the circumstances. The Court will first consider attorneys' fees.

Courts in South Carolina have listed a relatively small number of factors to be considered in awarding attorneys fees. For example, the Court in *Nienow vs. Nienow* 268 S.C. 161, 232 S.E.2d 504, 510 (1977), stated:

> In determining the amount of such fees we have delineated several factors which may be properly considered including, 'the nature, extent and difficulty of the services rendered; the time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation, and the beneficial results accomplished.' *Smith vs. Smith*, 253 S.C. 350, 170 S.E.2d 650. *Darden vs. Witham*, 263 S.C. 183, 193, 209 S.E.2d 42, 46 (1974).

One of the factors to be considered is the professional standing of counsel. Petitioner employed first the law firm of Goldberg, Cottingham and Easterling and that firm in turn

associated the Columbia law firm of Rogers, McDonald, McKenzie, Fuller and Rubin. These are prominent law firms. Harry R. Easterling was the member of the Marlboro County law firm representing Mrs. Anderson and Eugene F. Rogers was the member of the Columbia law firm who was associated. Both lawyers are well known, are eminently successful and come from law firms which are highly regarded. These firms enjoy and "A" Martindale-Hubble rating and each lawyer individually enjoys an "A" Martindale rating. These ratings indicate that these lawyers and their law firms are rated very high on the basis of the standard of ability for the place or area where the lawyer practices, taking into consideration experience, nature and length of practice and other material qualifications. The rating embraes faithful adherence to ethical standards, professional reliability and diligence and other relevant factors. In addition thereto, the evidence presented before me suggests that both lawyers are of unimpeachable integrity and both the evidence before me and the attention to duty and detail displayed during the trial of the case disclose that the representation accorded the Petitioner was of the highest quality.

In the *Nienow* case, supra, the court said that additional factors to be considered are "the nature, extent and difficulty of the services rendered," and "the time necessarily devoted to the case." 232 S.E.2d at 510. Other factors that have been considered by our courts include (1) the extent of the litigation, *Jones vs Jones,* 270 S.C. 143, 241 S.E.2d 417, 419 (1978), (2) the extent to which litigation was unnecessarily prolonged, *Cole vs. Cole,* 274 S.C. 449, 265 S.E.2d 669, 672, and (3) the beneficial results accomplished by the litigation. *Stone vs. Guaranty Bank & Trust Co.,* 270 S.C. 331, 242 S.E.2d 404, 406 (1978).

The Court will now consider the above factors.

Both lawyers presented detailed itemizations of the time consumed in representing the wife. Rarely has the Court seen a more detailed justification for itemization of time than that introduced into evidence without objection here. I find and conclude that they spent in the aggregate more than 800 hours on the case in addition to time spent in Court. Hearings and trial proceedings have required that Petitioner's lawyers be in Court for all or part of sixteen (16) days each, a total of thirty-two (32) lawyer days. Attached hereto as an appendix is a history of the litigation which was agreed by the parties in their brief to the Court as accurate.

Respondent has contended tht time was not spent wisely nor was much of the time necessary, and that the representation accorded Mrs. Anderson was too luxurious for the facts presented.

Petitioner has agreed that much time was spent in handling the case, but contends that the time expended was necessary and was responsive to actions of Respondent.

An indication of the time consuming complexity of the case is disclosed by issues raised in pleadings served by the husband dated April 11, 1980 consisting of seventeen (17) pages in which he sought among other things the following:

1. A complete psychiatric evaluation of the family unit, including the children of the parties hereto;
2. A directive that Wife "be required to pay the Respondent's counsel reasonable fees and costs for the defense hereof;
3. A directive that Wife be required to repay Respondent "the sums which Respondent has been required to pay for her temporary attorneys' fees and suit money;
4. A directive with respect to the Wife's half interest in the family home that she be required to transfer her interest therein to Respondent;
5. An adjudication that Husband was entitled to an equitable division of the Petitioner's educational degree and postgraduate training on the theory that the degree was an asset contributed to by the Husband;
6. A directive that all bank accounts, certificates of deposit and other assets be determined to belong to the Husband without claim by the Wife;
7. A directive that Wife's retirement plan which was the result of her teaching school should be declared to be subject to equitable divison and a share thereof granted Husband;
8. An adjudication that the amounts agreed as reasonable by the Husband at the November 15 hearing were excessive and an Order for reimbursement of the excess;

9. An Order that the Husband be granted custody of the three (3) minor daughters of the marriage;
10. An Order requiring Wife to pay child support to the Husband;
11. An adjudication that Petitioner's action was frivolous is nature and was known by her to be frivolous and asking its dismissal with costs;
12. A comprehensive discovery Order.

Although many of the issues were without merit, they were vigorously and agressively pursued by the husband and his counsel and response was required by the wife to demonstrate the issues were void of merit.

Additional time and effort was required by the failure of the husband to make support payments as required by the Order of November 29, 1979, and failure to comply with a discovery Order issued by consent in June of 1980. As a result a hearing was necessary to enforce the Court's Order and was held before me on October 14, 1980. At that time the Court held a pre-trial conference (Respondent had resisted a pre-trial conference) and it pointed out Family Court Rule 22 with respect to cooperation and exchanging information and had this to say:

> This court has a crowded docket. Rule 22 recognizes the need for '... prompt voluntary exchange of information and documents by parties ...' This court expects the attorneys to cooperate with each other in developing all relevant facts. This is for the benefit not only of the clients, but it saves the court's time, energy and resources.
>
> In the present instance, it is apparent that the time and resources of the court will be saved through supplying the information sought. Court order dated October 14, 1980.

At the same time the court heard a request by the wife for suit money. This request was vigorously contested by the Respondent, but an award was required to permit wife to bring necessary experts before the Court.

At the commencement of the trial, Petitioner called some of these experts to prove the value of the real estate owned by the parties. Real Estate constituted over two-thirds (2/3) of the value of all property. The record will disclose that much of the first trial day was spent on examination and cross-examination of the timber people, to wit: Mr. Billy Flowers, Mr. Tim Dargan and Mr. Robert Hulsart, on whether or not they had seen the right timber and whether or not they had appraised the right land.

After two days of testimony and on October 29, 1980, the trial was continued until December 2nd. During this time Petitioner sought to clear up the question of whether or not the right property had been appraised and the right timber cruised through requests for admission and sought to take the deposition of one of Respondent's experts. The Petitioner's position was that information required should have been voluntarily provided under Rule 22 and under this Court's discovery Order and its Order of October 21st which provided for the prompt voluntary exchange of information.

The Respondent vigorously resisted supplying the information and sought and moved for an order to prevent the deposition from being taken or the Requests for Admission being answered.

These motions were denied.

Following the Court's Order, (which was contested) the husband went over the property with the appraisers and agreed that the right property had been appraised.

Other problems faced by the wife involved inaccuracies in the husband's financial declaration. Three declarations were filed. Each contained material inaccuracies, particularly with respect to the value of Respondent's property. In the three declarations, the husband swore under oath that he owned property valued at $334,633.00 as of October 12, 1979, $411,045.00 as of October 27, 1980, and $381,144.00 as of February 7, 1981. The Court found that he had assets in excess of Nine Hundred Thousand ($900,000.00) Dollars. Indicative of inaccuracies is his statement of money owned by him. In the declaration of October 12, 1979, he said he had about $38,000.00. The Petitioner proved that as of May 1, 1979, the date of the separation, cash on deposit in Banks and Savings institutions and Bonds totaled $129,134.45 in addition to any cash on hand. He gave figures ranging from $235,000.00 to $280,000.00 as to real estate values. The Petitioner proved to the Court's satisfaction that the real estate titled to Respondent had a value of almost $600,000.00.

Monthly income and expenses were not fairly presented. Income tax liabilities were distorted. Other errors were proved by the Petitioner.

Efforts were made by Respondent to present claims against Petitioner because she attended college for a year after the marriage and sought to recover 29% of her past and future earning capacity by reason of his payment of several hundred dollars of her tuition. These claims were found to be without merit and were denied.

Respondent took the position that Mrs. Anderson's services were of no value and that she had made no contribution to the marriage. It was necessary that Petitioner prove these contributions. Evidence of food she had canned, vegetables which she had frozen, clothes which she had made, art which

she had painted, and accounting records which she had kept were all brought in to support her positions. Evidence was produced to prove the money which she had earned.

Another time consuming matter was Respondent's energetic contest of educational expenses for his children including the cost and support for his oldest child. The order of May 18 describes this issue with respect to the college age child. This position by the husband had no merit.

A review of the record discloses that Respondent contested practically every issue of any consequence. Cooperation was rare. Indicative of lack of cooperation was Respondent's refusal to comply with a subpoena issued by the Court requiring the production of certain art work by Mrs. Anderson. He first stated that he didn't have it, but when ordered by the Court to obtain it, he supplied the material from his brief case.

The testimony taken on November 12, 1981, describes some of the difficulties encountered by the Petitioner's attorney as follows:

> From the standpoint of difficulty, Judge, one of the problems that has created difficulty in this case, has been the frustrations, and these are some of the frustrations: information supplied me was illegible on occasions, it was inaccurate, incorrect and incomplete. For instance the pension plan which has turned out to be important was supplied me and it was illegible. The copy quality was so poor I couldn't read it. The charts that Dr. Oliver Wood

supplied me were illegible and I couldn't read them. One of the most important checks or an important check ws a check showing the payment of $20,300.00 as estate taxes. I was supplied the checks and that one was missing. (Tr. 15, L.24 - P.25, L.10)

* * *

... another frustration in this case is the difficulty I have getting in touch with counsel by telephone. Many times a telephone call would save a lot of work. I've got instances where the telephone calls are not returned and instances where letters were not answered ... (Tr. 19, L.25 — P 20, L.5)

* * *

The next thing that happened was we were prepared to go to trial, and this is another frustration ... sometime in September. The first thing that showed up and made me know that we were not going to trial was that I got a copy of a continuing legal education seminar brochure where the seminar was taking place on the trial date and Mr. Warner was listed as being on the program, and Mr. Warner had not told me that we were not going to be here. I was preparing, maybe he didn't have to call me but generally, as a matter of courtesy, I let lawyers know if I know something that isn't going to come up, ... (Tr.20, L.20 - P.21, L.3)

Frustrations incurred by Petitioner are apparent. It is significant tht the facts stated above are uncontradicted.

Courts from other states have considered additional factors in setting fee awards. For example, one factor is "whether counsel's skill and effort were wisely devoted to the expeditious disposition of the case." *In re Marriage of Lopez*, 38 Cal. App.3d 93, 113 Cal. Rptr. 58, 71 (1974). In the same regard, the husband's "legal stonewalling and obstructionist tactics," as well as his financial position and the merits of the action, have been considered. *Stern vs. Stern*, 67 App. Div.2d 253, 415 N.Y.S.2d 225, 227 (1979). *Stern* is particularly appropriate for the present case because the husband there had engaged in delaying tactics and refused to make a complete disclosure. The extensive discovery utilized by the wife to discover the husband's worth was a factor considered by the Court in *Grenier vs. Grenier*, 384 N.E.2d 1055 (Ind. App. 1979). Likewise, untrue allegations made by the husband that result in extending the litigation are also factors to be considered. *Albert vs. Albert, 10 Ill. App. 3d 539, 294 N.E.2d 695, 697-98 (1972).*

In Mancuso vs. Manusco, 428 N.E. 2d 339 (App. Ct. 1981) the Court found that the husband's testimony was "frought with deception" and that he tried to hide from the Court his ability to pay. The Court concluded that this was a proper factor to be taken into consideration by the trial judge in an equitable distribution case.

In the *Cole* case, supra, the Court determined that in setting attorney's fees, it was proper to take into consideration the extent to which litigation was unnecessarily prolonged.

In this case, the Court finds and concludes that Respondent failed to cooperate, raised issues which were devoid of merit, aggressively resisted meritorious positions by the wife, and otherwise prolonged the hearings unnecessarily. Some

issues raised such as whether or not his child was entitled to a college education bordered on bad faith. There is no evidence that Petitioner unreasonably protracted the proceedings.

The husband also complained that the wife employed two attorneys to represent her and this was unnecessary. This issue was addressed by Petitioner's expert witnesses. Based on my observations in the case and the testimony and evidence the Court finds and concludes that under the circumstances two (2) lawyers were reasonably necessary in representing the Petitioner. Respondent himself began this proceeding with two (2) lawyers and subsequently employed a third. The first two lawyers were Robert L. Kilgo of Darlington and Wade Crow, Esquire, of Bennettsville. He subsequently employed Jan L. Warner, Esquire, of Sumter and C. Dixon Lee, associated with Mr. Warner, has participated in phases of the case.

The testimony is varied as to what a reasonable fee would be. Witnesses called by the wife were of the opinion that attorney's fees of approximately $21,400.00 would be fair and reasonable for Mr. Easterling and approximately $59,000.00 would be fair and reasonable for Mr. Rogers or a total of about $80,400.00 in fees. This included fees for work on an appeal through November 12, 1981. On the other hand, a witness called by the husband testified that something between $25,000.00 and $30,000.00 in attorney time would be the proper range.

In connection with the expert witnesses presented by the parties, I have carefully considered their testimony, observed the witnesses upon the witness stand, judged their demeanor, appearance, interest, qualifications, experience, and the nature of their testimony. Considering the experience, qualifications

and competence of the wife's experts when compared with the husband's expert, I find their opinions and judgment to be more sound. Mr. Saleeby has practiced law for well over thirty years. Mr. Thomas has practiced for over a quarter century. The husband's expert had practiced for about five years.

Bills from witnesses including an economist, an insurance actuary, an expert in income taxation, Dr. Phillip G. Steude, the psychiatrist, Mr. Robert Hulsart, real estate expert, Mr. Lucas M. Dargan, the timber expert and other witnesses total of $20,217.20. The wife's witnesses testified that those witness fees were fair and reasonable. On the other hand, the husband's expert testified that "In terms of experts somewhere in the range of $7,000.00 to $10,000.00 would have put up a good case." (P 110-line 22-24) Other court costs and out of pocket expenses totaling $18,936.91 were itemized.

With respect to the expert testimony presented by the wife, the Court finds that the two lawyers which she called are both emminently successful and outstanding lawyers. Robert J. Thomas of the Richland County Bar and Edward E. Saleeby testified for the wife. Each, prior to his testimony, had reviewed the file and briefs of counsel. Each of these experienced lawyers stated that they had reviewed with counsel such counsel's file, had reviewed the Cannon relating to establishing attorneys' fees and testified to the reasonableness of the fees sought by wife's attorneys and the reasonableness of the costs and witness fees paid. The husband stipulated that Mr. Thomas was a well qualified attorney with significant practical experience in the legal profession (T 71-L 18-21)

The Court has considered the nature, extent and difficulty of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, the contingency of

compensation, and the beneficial results accomplished. I conclude that no one of these factors in itself is controlling and have given consideration to all in arriving at a reasonable fee. In reaching my conclusion as to fees for wife's counsel, I have excluded any consideration of work done on the appeal to the South Carolina Supreme Court. This is a proper charge to the husband and a proper element to be taken into consideration, but feel that it should not be considered until after the appeal is over.

After fully considering the matter, I am of the opinion that $56,000.00 is a fair and reasonable fee to be paid Eugene F. Rogers for services rendered through the hearing held before me on November 12, 1981. This excludes any consideration of work done on the appeal. I find and conclude that $17,500.00 is a fair and reasonable fee for Harry R. Easterling for his services. These fees total $73,500.00. Each has been paid $1,000.00 and credit for this amount against the fee set is proper.

I find and conclude that the witness fees and court costs as outlined on page 97A should be paid by Respondent. This comes to a total of additional $20,217.20 (Mr. Saleeby's fee was over-estimated by $600.00) in witness fees and $19,125.56 in costs. This comes to a total of $113,842.76. The husband hs paid pendente lite costs and fees of $6,218.65 and this leaves an award by this Order of $106,624.11.

The husband has assets as found by Order of the Court. He presumably has paid his witness fees, court costs and attorney's fees, whereas the wife, on the other hand, has had no funds with which to finance the litigation and substantial costs and fees are now outstanding. Because of this, it is the Court's opinion that the husband should forthwith make these payments. Appeals are underway. The payment of these fees and costs are necessary. The Court has not considered a

pendente lite attorneys' fee award to finance the cost of litigation in the Supreme Court, but the fees and costs here awarded should be adequate to finance additional litigation costs until the matter has been finally concluded, at which time additional costs may then be considered.

NOW, THEREFORE after fully considering the matter, IT IS ORDERED ADJUDGED AND DECREED:

(1) That you Bunyan W. Anderson do pay to the Petitioner Mrs. Joanne E. Anderson the sum of $106,624.11.

(2) An appeal from this Order shall not suspend enforcement of the Court's Order should compliance not be had.

(3) Petitioner is given the right to enter up the award this date made as a judgment against Respondent and the same may at her option be collectible by her as a money judgment, and should constitute a lien on assetss of Respondent including real estate until satisfied and may be recorded in any county where Respondent owns property.

(4) The costs and fees incurred in the appellate process are reserved until after appeal.

AND IT IS SO ORDERED.

S. NORWOOD GASQUE
Chief Judge
Fourth Judicial Circuit
Family Court

Dillon, South Carolina

May 4, 1982.

HISTORY OF THE LITIGATION

May 16, 1979	Joanne Anderson files suit for divorce; Summons and Petition served; Harry Easterling, Attorney for Mrs. Anderson;
June 13, 1979	Answer to Petition filed; Robert Kilgo and Wade Crow, Attorneys for Mr. Anderson;
June 18, 1979	Mrs. Anderson filed a petition with the Court seeking support for her children and herself *pendente lite*, attorneys fees *pendente lite* and other relief, Mr. Rogers is associated;
June 19, 1979	Return to Rule to Show Cause filed by Wade R. Crow and Robert L. Kilgo, Attorneys for Respondent;
June 22, 1979	Hearing in Bennettsville before Judge Gasque; the parties agreed without prejudice to their legal positions that pending further Order of the Court, the family bills would be paid in accordance with the custom and practice while the parties were living together. Mrs. Anderson and the children return to the family home;
November 7, 1979	Petition filed seeking support and attorneys fees, *pendente lite*. Show Cause Order signed by Judge Gasque returnable in Hartsville on November 15; Motion filed to amend Petition;
November 9, 1979	Answer to Petition filed;
November 15, 1979	Hearing in Hartsville before Judge Gasque on support and attorneys' fees;

November 29, 1979 Order signed by Judge Gasque concerning support for Petitioner and her children and visitation privileges;

December 13, 1979 Order signed by Judge Gasque allowing Petitioner to amend her pleadings and granting her suit money *pendente lite*, of $2,000.00.

December 21, 1979 Notice to Produce from Robert L. Kilgo to Eugene F. Rogers and Harry L. Easterling;

December 21, 1979 Affidavit of B. W. Anderson requesting financial information from Petitioner;

February, 1980 Jan L. Warner, Sumter, South Carolina, enters the case for Mr. Anderson;

April 4, 1980 Deposition of Joanne Anderson completed, deposition of B. W. Anderson begun;

April 4, 1980 Amended Petition filed;

April 11, 1980 Answer to Amended Petition filed and Motions to require psychiatric examinations and relating to discovery;

April 22, 1980 Requests for Inspection and Copying to Joanne Anderson from Jan Warner;

June 16, 1980 Deposition of B. W. Anderson completed;

June 20, 1980 Order signed by Judge Gasque on Motion of Mr. Warner for Mr. Anderson requiring psychiatric examination by Dr. Steude of the children and the parties and relating to discovery;

July 31, 1980 Examination of the Anderson Family by Dr. Steude, psychiatrist in Columbia, pursuant to Court Order;

August 22, 1980 Supplemental Answer and Counterclaim filed by Jan Warner;

August 22, 1980 Requests for Inspection and Copying from Jan Warner to Eugene F. Rogers;

August 22, 1980 Notice of Motion to Make a Supplemental Answer and Counterclaim from Jan Warner to Eugene F. Rogers;

September 3, 1980 Answers to Requests for Admissions to Jan Warner from Eugene F. Rogers;

September 26, 1980 Petition filed by Petitioner asking the Court to order Respondent to show cause why he should not be held in contempt for violating two Court Orders;

September 29, 1980 Order and Rule to Show Cause signed by Judge Gasque ordering Mr. Anderson to show cause as to why he should not be held in contempt;

October 8, 1980 Notice of Motion and Motion to Jan Warner from Petitioner's attorneys concerning issues to be raised at the pre-trial conference;

October 8, 1980 Return filed by Jan Warner concerning contempt charges, etc.;

October 8, 1980 Notice to Produce from Jan Warner to Eugene F. Rogers concerning pay records, bank records, etc.;

October 8, 1980 Two Notices from Jan Warner to Eugene F. Rogers of Motion for an Order assessing sanctions and costs against Petitioner for requiring Respondent to produce testimony in regards to requests for admission and 4 additional Orders against the Petitioner;

October 10, 1980 Amended Return filed by Jan Warner;

October 13, 1980 Reply to Return and Motions filed by Petitioner's counsel and Answer by way of response to the Counterclaim also filed;

October 14, 1980 Pre-trial hearing in Bennettsville before Judge Gasque.

October 14, 1980 Order signed by Judge Gasque concerning issues raised at Pre-Trial conference. Judge Gasque encouraged prompt discovery;

October 21, 1980 Order signed by Judge Gasque concerning contempt charge against Mr. Anderson and ordering Respondent to provide Petitioner's attorney with certain financial information;

October 21, 1980 Notice of appeal filed by Jan L. Warner;

October 28, 1980 Hearing in Bennettsville before Judge Gasque, Petitioner called Mr. Dargan (timber), Mr. Flowers (timber), and Mr. Hulsart (real estate appraiser);

October 29, 1980 Hearing in Bennettsville before Judge Gasque, Petitioner calls Dr. Steude (psychiatrist), Elizabeth Pence (witness to physical cruelty), and Dr. Jesse S. Crisler (Headmaster at Marlboro Academy);

November 3, 1980 Request for Admissions and Notice from Petitioner's attorneys to counsel for the Respondent to admit to the truth of statements concerning the tobacco allotments of the Respondent;

November 3, 1980 Order signed by Judge Gasque continuing the hearing on December 2nd, December 3rd, December 4th, and December 5th;

November 10, 1980 Petition filed by Eugene F. Rogers requesting that Respondent be held in contempt because of his failure to comply with the Court Order of December 13, 1979, to make disclosures with respect to his real property, etc. Subsequent Order requiring Hearing;

November 17, 1980 Notice of Special Appearance and Motion to Dismiss on Behalf of the Respondent filed by Jan Warner;

November 17, 1980 Return filed by Respondent's attorney Jan Warner;

November 17, 1980 Hearing in Bennettsville before Judge Gasque on Discovery, Motions and Contempt of Mr. Anderson;

November 19, 1980 Order signed by Judge Gasque allowing Dr. Oliver Wood's deposition to be taken;

November 25, 1980 Notice of Appeal filed by Jan L. Warner;

November 26, 1980 Dr. Oliver Wood's deposition taken only after Court issued its Order;

November 26, 1980 Notice from Jan Warner to Eugene F. Rogers that Respondent will move for an Order requiring the Petitioner to provide Dr. Wood all information which Petitioner takes the position may not be included in Dr. Wood's computations;

November 26, 1980 Notice to Produce to Eugene F. Rogers for Dr. Henry's reports, etc.;

December 1, 1980 *Subpeona Duces Tecum* served on Mr. Anderson requiring him to bring all records in connection with the Anderson case;

December 2, 1980 Hearing in Bennettsville before Judge Gasque; Petitioner continued her case; witnesses called were Dr. Travis Pritchett (retirement plan actuary), Mr. Billy Flowers (timber), Mr. George Eleazer (Mrs. Anderson's father);

December 3, 1980 Hearing in Bennettsville; Petitioner starts testifying;

December 4, 1980 Hearing in Bennettsville; Petitioner as witness, but is interrupted for Dr. James Henry, economist and Robert Young, tax specialist;

December 5, 1980 Hearing in Bennettsville; Petitioner continues and is cross-examined by Mr. Warner;

December 5, 1980 Motion served on Jan Warner of Motion for an Order to amend the Petition to permit the Court to consider provision for a college education for the oldest daughter, Dana Anderson;

December 22, 1980 Memorandum of Law opposing Petitioner's Motion to Amend her Prior Pleadings to Include a Request for Collegiate Education filed by Jan Warner;

December 22, 1980 Motion granted amending Petition over objection of Respondent, Dana testifies to need for college education;

December 22, 1980 Hearing in Bennettsville; Respondent calls Richard Hilton (South Carolina National, banker), John Parrish (appraiser for the estate of E. C. Anderson), and Ellen James (maid to Lucille Anderson);

December 23, 1980 Hearing in Bennettsville; Respondent calls Don Middleton (neighbor to Lucille Anderson), Randy and Robert White (neighbors to Lucille Anderson and farmers) and Linda Anderson Bruton (sister to Mr. Anderson), hearing continued.

January 6, 1981 Order signed by Chief Justice J. Woodrow Lewis reassigning Judge Gasque to preside over the term of the Family Court for Marlboro County for the week commencing February 9, 1981;

January 19, 1981 Order of Continuance signed by Judge Gasque for hearing rescheduled for February 10th, February 11th, February 12th, and February 13th, 1981;

February 12, 1981 Hearing in Bennettsville; Respondent calls Mr. W. Saverance (Pee Dee State Banker), Mr. and Mrs. O'Tuel (former friends and neighbors), Mrs. Lucille Anderson (mother to Mr. Anderson), Mr. E. Jackson Stevens (timber buyer) and Respondent himself;

February 13, 1981 Hearing in Bennettsville; Respondent's case continues with Respondent as witness and Dr. Oliver Wood (economist);

February 20, 1981 Hearing in Bennettsville before Judge Gasque; cross-examination of Respondent; Respondent completes his case; Judge Gasque talks to the children.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 27 1982
DER L. STEVAS,

NO. 81-1873

In the Supreme Court of the United States

OCTOBER TERM, 1981

BUNYAN W. ANDERSON, PETITIONER,

versus

JOANNE E. ANDERSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF

JAN L. WARNER,
Post Office Box 2347,
Sumter, South Carolina
29150,
(803) 773-1596,
Attorney of Record,

C. DIXON LEE, III,
Post Office Box 2347,
Sumter, South Carolina
29150,
(803) 773-1596.

QUESTIONS PRESENTED

1. Whether the January 7, 1982 opinion of the South Carolina Supreme Court, which Petitioner seeks to have this Court review on certiorari, is a final judgment or decree as is required by 28 U.S.C. §1257.

2. Whether there exists an adequate and independent State ground justifying the decision of the South Carolina Supreme Court.

3. Whether the Petition for a Writ of Certiorari presents a substantial federal question.

4. Whether the private or *ex parte* meeting on March 27, 1981 between Respondent's counsel and the trial judge was for the express and specific purposes of Respondent's counsel and the trial judge discussing the case, in private, without notice to Petitioner or his counsel, and of Respondent's counsel providing the trial judge information about the case and answering the trial judge's questions about the case.

5. Assuming that the private meeting between Respondent's counsel and the trial judge on March 27, 1981 included the purpose of the trial judge instructing Respondent's counsel to prepare an Order, did that meeting deny Petitioner his right to due process of law?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Authorities iv

Opinions Below 1

Grounds on Which Jurisdiction is Invoked 2

Statement of the Case 2

Arguments 7

Conclusion 12

Appendix ..... A-i

TABLE OF AUTHORITIES

Cases Cited: PAGE

Carroll v. Cash Mills,
118 S.E. 290 (S.C. 1923) 11

Cox Broadcasting Corporation v. Cohn,
420 U.S. 469 4

Logan v. Zimmerman Brush Co.,
_____ U.S. _____, 102 S.Ct. 1148 10

Mathews v. Eldridge,
424 U.S. 319 10

Ridgeway v. Ridgeway,
_____ U.S. _____, 102 S.Ct. 49 5

Santosky v. Kramer,
455 U.S., 102 S.Ct. 1388 10

Vitek v. Jones,
455 U.S. 480 10

In the Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-1873

BUNYAN W. ANDERSON, PETITIONER,

versus

JOANNE E. ANDERSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF

The Petitioner Bunyan W. Anderson respectfully requests that a Writ of Certiorari issue to review the January 7, 1982 decision of the Supreme Court of South Carolina.

OPINIONS BELOW

The unreported decision of the Supreme Court of South Carolina was handed down on January 7, 1982 and is reproduced in the Petition for a Writ of Certiorari as Appendix A. The unreported decision of the Supreme Court of South Carolina on Petitioner's

Motion for Clarification was handed down on February 2, 1982 and is reproduced in the Petition for a Writ of Certiorari at Appendix B.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision of the Supreme Court of South Carolina was handed down on January 7, 1982. The Petition for a Writ of Certiorari was timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . .

2. Article VI, Section 2 of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

The issue presented to this Court is whether the private or *ex parte* meeting between Respondent's attorney and the trial judge, who sat as a court of equity without a jury, which meeting was conducted without

notice to the Petitioner or his attorney; which meeting occurred subsequent to the presentation of evidence, but before a decision on the merits of the action was issued; and which meeting was conducted for the express purpose of Respondent's attorney providing the trial judge with information about the case, discussing the case, and answering the judge's questions about the case, denied the Petitioner his right to due process of law under the Fourteenth Amendment to the United States Constitution so as to constitute a substantial and grave miscarriage of justice, and thus warrant a new trial on all issues.

Respondent has attempted to misdirect the Court's attention from this issue. The question presented for review has been considered by the Supreme Court of South Carolina, the highest state court in which a decision can be had, and has been denied by that Court by its opinion that Petitioner's claim is "without merit."

The January 7, 1982 Order of the Supreme Court of South Carolina is a final Order under the definition of 28 U.S.C. §1257. It is not subject to any further review by the state courts, notwithstanding the fact that there are further state court proceedings pending. Those pending state court proceedings involve questions of state law. The federal question presented herein is not subject to further state court review. If, in fact, the federal question presented herein is resolved favorably to Petitioner, then it will render moot the pending state court appeals.

In the Brief of Respondent in Opposition, it has been argued that the procedure which was employed by Respondent's counsel and the trial judge, namely meeting privately to discuss the case, to answer the judge's questions about the case, and to provide the judge information

about the case, all prior to an Order being issued, is common practice in the State of South Carolina. If, in fact, this is a common practice, then all the more reason exists for this Court issuing its Writ of Certiorari to review that procedure.

REASONS FOR GRANTING THE PETITION

1. The January 7, 1982 Opinion of the Supreme Court of South Carolina, which Petitioner seeks to have this Court review on Certiorari, is a final judgment or Decree as is required by 28 U.S.C. §1257.

Admittedly, there are appeals pending in the state courts in which Petitioner has alleged errors of state law in the trial court's Order of May 18, 1981, as well as various ancillary Orders issued by the trial court, including the May 4, 1982 Order which awarded Respondent's counsel in excess of One Hundred Six Thousand and no/100 ($106,000.00) Dollars in attorney's fees. Nevertheless, the federal question herein, namely whether the private or *ex parte* meeting between Respondent's counsel and the trial judge, who sat as a court of equity without a jury, denied Petitioner's right to due process has been reviewed and finally been decided by the highest state court in which review is available. It is not subject to further review by the state courts. If the procedure under which the trial court's Order of May 18, 1981 was issued is determined to be constitutionally defective, then the appeals now pending in the state court will be rendered moot. The January 7, 1982 decision of the Supreme Court of Court Carolina is a final judgment or Decree, therefore subject to review by this Court under the definition of 28 U.S.C. §1257. *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469.

2. There is no adequate and independent State ground justifying the decision of the Supreme Court of South Carolina.

The January 7, 1982 decision of the Supreme Court of South Carolina, without stating a reason therefor, provided: "Motions denied." This decision is set forth in Appendix A of the Petition for a Writ of Certiorari. Petitioner subsequently sought clarification of that decision. On February 2, 1982, the Supreme Court of South Carolina clarified its prior decision, stating that the motion was denied because it was "without merit." This decision is reproduced at Appendix B in the Petition for a Writ of Certiorari. There is nothing whatsoever in the record before this Court, or in the record before the Supreme Court of South Carolina, which would justify this Court finding, by implication or otherwise, that the decision of the Supreme Court of South Carolina was based upon state law rather than federal law. The decision of the Supreme Court of South Carolina addresses the merits of the federal question presented and determines, without setting forth any reason, that Petitioner's federal claim is: "without merit."

3. The Petition for a Writ of Certiorari presents a substantial federal question for review.

Unquestionably, family law has traditionally been largely within the exclusive province of state courts. *Ridgeway v. Ridgeway,* _____ U.S. _____ 102 S.Ct. 49. While the question presented to this Court arises out of a domestic controversy, the issue is not one of state law, but of federal law. Petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution cannot be denied or abridged merely because the action is a domestic or family controversy.

As recognized by Article VI, §2 of the Constitution of the United States:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

While the question presented to this Court is in the context of a domestic dispute, it is a substantial federal question dealing not with state law, but with federal law, and with Petitioner's right to due process of law.

4. The March 27, 1981 meeting between Respondent's counsel and the trial judge was for the express and specific purpose of Respondent's counsel and the trial judge, who sat as a court of equity without a jury, discussing the case in private, without notice to Petitioner's counsel, and Respondent's counsel, providing the trial judge information about the case and answering the trial judge's questions about the case.

On November 12, 1981, Eugene F. Rogers, one of the attorneys representing the Respondent, testified under oath concerning his private meeting on March 27, 1981 with the trial judge:

Q. (by Mr. Warner) And you went to Dillon for the purpose of meeting the Court or meeting with the Judge?

A. (by Mr. Rogers) No, sir. I went to Dillon in response to the Judge's request that I provide him with some information.

Q. (by Mr. Warner) About this case?

A. (by Mr. Rogers) It was to discuss, to answer his questions about this case, yes, sir.

This testimony is reproduced at Appendix E in the Petition for a Writ of Certiorari.

This issue was brought before the Supreme Court of South Carolina on November 13, 1981, one day after Mr. Rogers' testimony.

Subsequently, on November 25, 1981, thirteen (13) days after his testimony, Mr. Rogers executed an affidavit wherein he has averred, again under oath, that the purpose of the March 27, 1981 meeting was for the Judge to request him "to prepare a proposed Order." This affidavit is reproduced at Appendix B of the Brief of Respondent in Opposition. This affidavit largely contradicts Mr. Rogers' sworn testimony of November 12, 1981. The affidavit is entirely self-serving, and must be viewed in light of the fact that it was not prepared or executed until after the constitutional question was raised, and until after Mr. Rogers had an opportunity to reflect on the implications of the meeting.

Respondent has also submitted correspondence from the trial judge dated December 7, 1981 in which the trial judge states that he requested Mr. Rogers to come to his office on March 27, 1982 in order to give him "instructions" to assist the Court in the preparation of an Order. This correspondence is reproduced at Appendix A of the Brief of Respondent in Opposition. It must be noted that this correspondence was not written until after the issue of the private meeting was raised in the Supreme Court of South Carolina. There is no indication of how the trial judge came to "understand how some question has arisen about the (private) conference which I had in my office in Dillon on March 27, 1981 with Mr. Rogers."

Finally, the trial judge's correspondence of December 7, 1981 must be viewed in light of his prior correspon-

dence of April 10, 1981 to Petitioner's counsel wherein he stated "I plan to get started on the Order in the Anderson case right away." This correspondence is reproduced herein at Appendix A. This correspondence was written some two (2) weeks after the March 27, 1981 private meeting between the trial judge and Respondent's counsel. According to the trial judge's correspondence of December 7, 1981, he had already decided the case on March 27, 1981 and instructed Mr. Rogers to prepare an Order. According to his correspondence of April 10, 1981, he had not yet started on the Order in the Anderson case. The inconsistency is apparent.

The Respondent's assertion that the March 27, 1981 private meeting between Respondent's counsel and the trial judge was for the purpose of requesting Respondent's counsel to prepare an Order must also be viewed in light of the fact that Mr. Rogers' time records, which are extensive, which purport to include all time which Mr. Rogers has expended on this case, and which include records of time expenditures between March 27, 1981, the date of the private meeting, and May 18, 1981, the date of the Order in question, include absolutely no time expenditure whatsoever devoted toward the preparation of an Order.

Numerous other facts and circumstances surrounding this case strongly infer that the March 27, 1981 meeting was for some purpose other than, or in addition to, the trial judge instructing Respondent's counsel to prepare an Order. The private meeting occurred on the very day on which oral argument had been originally scheduled, but then cancelled. The private meeting occurred less than a week after Petitioner submitted his brief to the trial judge. This brief, including exhibits, contained in excess of one hundred thirty (130) pages.

The meeting occurred only one day after the Respondent submitted to the trial judge a Reply Brief containing forty three (43) pages, including exhibits. Finally, the May 18, 1981 Order was not issued until more than seven (7) weeks after the private meeting.

It is impossible for Petitioner to prove exactly what occurred on March 27, 1981. There is no transcript or other official record of what occurred at the private or *ex parte* meeting between Respondent's counsel and the trial judge. What actually occurred at that meeting will never be known. The only record available to Petitioner of what may have occurred on March 27, 1981 is the testimony of Respondent's counsel, given under oath on November 12, 1981. This testimony establishes that the meeting was conducted for the purpose of Respondent's counsel providing the trial judge "with some information" about the case; for Respondent's counsel "to discuss" the case with the trial judge; and "to answer his (the trial judge's) questions about the case." This testimony speaks for itself. It was given under oath. It was given before Petitioner raised the federal question. Mr. Rogers' subsequent version of the purpose of this meeting, which varies substantially from his testimony on November 12, 1981, is self-serving and was offered only after Mr. Rogers was placed on notice that the federal question was being raised.

5. Assuming that the March 27, 1981 private or *ex parte* meeting between Respondent's counsel and the trial judge included the purpose of the trial judge requesting Respondent's counsel to prepare a proposed Order and giving him instructions therefor, then Petitioner's right to due process of law has still been denied.

As recognized in *Santosky v. Kramer*, 455 U.S. _____, 102 S.Ct. 1388, 1395:

> The "minimum requirements (of procedural due process) being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 455 U.S. 480, 491, 100 S.Ct. 1254, 1262, 63 S.Ct. 552 (1980). *See also Logan v. Zimmerman Brush Co.*, _____ U.S. _____, _____, 102 S.Ct. 1148, 1155-56, 71 L. Ed. 2d _____ (1982).

"[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substantive procedural safeguards; and finally, the government's interest, including the function involved and fiscal and administrative burdens that the additional or substantive procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 334-35. *Also see Santosky v. Kramer, supra.*

Here the private interest which was affected by the official action is substantial. The existing Orders require Petitioner to pay Respondent in excess of Three Hundred Eighty One Thousand and no/100 ($381,000.00) Dollars in property division, lump sum alimony, and attorney's fees. This must be satisfied largely from property acquired by Petitioner through gift and inheritance from his family.

The risk of an erroneous deprivation of Petitioner's pecuniary and proprietary interests through the proce-

dure of private meetings between the attorney representing Respondent and the trial judge, who sat as both judge of the law and judge of the facts, is substantial. There was no record or transcript made of the meeting. The Petitioner and his attorney were not given notice of the meeting. The opportunity for the sole attorney present to assert influence on the trial judge's decision is readily apparent.

Under South Carolina State law, the judgement of a trial court is not final, and is subject to revision, until it is actually filed with the Clerk of Court, at which time it fixes the rights of the parties. *Carroll v. Cash Mills,* 118 S.E. 290 (S.C. 1923).

There is a readily available substantive or additional procedural safeguard which, if utilized, would eliminate the possibility of such influence. If, in fact, the workload of the Family Court Judges requires that counsel prepare Orders, then the instructions or requests from the judge to counsel can be given in open court, in the presence of all parties or their counsel.

The additional fiscal and administrative burden which this procedure would entail is, at best, minimal. Such procedure would require no additional time on the part of the trial judge. He would only be required to present his instructions in the presence of all parties or their counsel, after notice, instead of to only one attorney. The only additional expense, if any, would be to provide notice to all parties or their counsel, not only to one side. This expense, if any, would be minimal, but would assure due process of law.

CONCLUSION

For the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue to review the January 7, 1982 decision of the Supreme Court of South Carolina.

Respectfully submitted,

JAN L. WARNER,
Attorney of Record,
Post Office Box 2347,
Sumter, South Carolina
29150,

C. DIXON LEE, III,
Post Office Box 2347,
Sumter, South Carolina
29150,

Appendix

APPENDIX CONTENTS

PAGE

Appendix A. Copy of April 10, 1981 Letter from S. Norwood Gasque, Chief Judge, to Jan L. Warner concerning Order in the Anderson case A-1

APPENDIX A

FAMILY COURT
FOURTH JUDICIAL CIRCUIT
Dillon, South Carolina 29536

S. Norwood Gasque
Judge

P.O. Box 1022
(803) 774-7012

April 10, 1981

Jan L. Warner, Esquire
Attorney at Law
P.O. Box 2347
Sumter, South Carolina 29150

Re: Cannarella vs. Cannarella

Dear Jan:

I have received your letter of April 8th. in reference to an Order to which you have consented in the above case. Mr. Saleeby has not submitted the Order but I am going to be back in Darlington again today and I assume he will bring it over from Hartsville.

I am glad that Mr. Cannarella has complied with the Order, otherwise, I would have to hold him in contempt.

I, also, received the opinion in the McIntosh case from Florida. I have not read it yet but will do so over the weekend. It was very thoughtful of you to send it to me.

I plan to get started on the Order in the Anderson case right away.

With kindest regards, I am

Sincerely yours,

s/S. Norwood Gasque
Chief Judge

SNG: dm